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AN ELEMENTARY TREATISE
ON THE
AMERICAN LAW
OF
REAL PROPERTY.

BY
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TO THE
HONORABLE PHILEMON BLISS, LL.D.,
EX-JUDGE OF THE SUPREME COURT OF THE STATE OF
MISSOURI, AND DEAN OF THE LAW DEPARTMENT OF THE
UNIVERSITY OF MISSOURI:

To your earnest sympathy and encouragement may in a great degree be ascribed whatever success attends the present effort; and in submitting its results to the judgment of the profession, I gladly seize the opportunity, which is afforded me in dedicating this volume to you, to give expression to my admiration of your many resplendent qualities of mind and heart, of your professional zeal and attainments, and my gratitude for your personal friendship and interest in my work.

P R E F A C E .

In presenting to the profession a new work on the American Law of Real Property, the author does not deem an apology necessary, although it may be appropriate to state briefly his object and the scope of the work. The experience of the author, both as a student and as an instructor in this branch of the law, has led him to believe that students of the law generally look upon the law of Real Property as extremely technical, arbitrary and unreasonable. Believing that all law is founded upon reason, and is developed by forces, which are not produced or even controlled by the arbitrary will of the legislator, and feeling confident that a logical or historical reason could be found for every principle of the law of Real Property, the author has made that subject the object of his special study, and this volume is given to the profession as the result of his investigations, with the hope that it might aid in stripping this branch of the law of its harsh and uninviting dress.

In one sense, this book cannot be considered exhaustive, for volumes can be written on the subject without exhausting it. But it is thought that, in another sense, the book may be considered as reasonably exhaustive, in that it contains the enunciation of all those principles which are necessary to a broad and comprehensive knowledge of the

subject. Instead of filling these pages with numerous citations of the facts of particular cases, and leaving to the student the discovery of the general principles, which underlie the cases, these principles are presented in a logical and systematic order, with a statement of the rational or historical source of each, while copious references to decided cases and standard treatises will enable the student to pursue his investigations into all the ramifications of the subject. It is hoped that this plan of treatment will give to the work a peculiar value as a text-book for students, while it will furnish to practitioners a book of ready reference.

Free use has been made of the researches of other writers, and references to their works will be found on almost every page; but the author considers it necessary to make a special acknowledgment of his indebtedness to the treatises of Mr. Williams and Professor Washburn for the valuable assistance which he has derived from them.

In commending this work to the favorable consideration of an enlightened profession, the author trusts that it will not be adjudged to be without merit.

C. G. T.

UNIVERSITY OF THE STATE OF MISSOURI, LAW DEPARTMENT,
November 1st, 1883.

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THE LAW OF REAL PROPERTY.

PART I.

CHAPTER I.

REAL PROPERTY.

SECTION 1. What is real property.

2. What is land.
3. Fixtures.
4. Between what parties the question may arise.
5. Constructive annexation.
6. Question of fixtures between landlord and tenant.
7. Time of removal.
8. Emblements.
9. Trees.
10. Double ownership in land
11. Lands, tenements, and hereditaments.

§ 1. **What is real property.** — In the English common law, property is divided into two classes, real and personal. Real property is such as has the characteristic of immobility or permanency of location, as lands, and rights issuing out of land. Personal property is every species of property which does not have the above mentioned characteristics. The former class constitutes the subject of these pages.

§ 2. **What is land.** — All real property or things real, are said to be comprehended under the terms, *lands, tenements, and hereditaments*. Land is the soil of the earth, and includes everything erected upon its surface, or which is buried beneath it. It extends in theory indefinitely upward, *usque ad cælum*, and downward, *usque ad orcum*. Under the term *land*, therefore, are included the buildings, made so under the doctrine of accession, and the trees and other things growing upon the land, under the doctrine of acquisition by production, as well as the minerals which may be embedded in the earth.¹ If water runs over the land, the ownership of the land gives a right to the use of the water, but does not create therein a permanent right of property. The property consists in the use.² A grant of lands, therefore, without any qualification, conveys not only the soil but everything else which is attached to it, or which constitutes a part of it, the buildings, mines, trees, growing crops, etc. Even trees which have been cut, and are lying upon the land, have been said to pass with the land.³ On the other hand, it has been held that a grant of a mill included the contiguous land which had been used

¹ 2 Bla. Com. 17-19; Co. Lit. 4g; 1 Washb. on Real Prop. 3, 4; Williams on Real Prop. 14.

² See *post*, sect. 614. But whether ice, formed upon a stream or pond, belongs to the owner of the soil, is a doubtful question. If it is an artificial stream, it seems settled that the owner of the bed has a right of property in the ice—*Mill River Co. v. Smith*, 34 Conn. 462; *Paine v. Woods*, 108 Mass. 173. And the same position has been sustained in Indiana in respect to a natural stream. *State v. Pottmyer*, 33 Ind. 402. In Massachusetts, ice formed on a natural stream seems to be common property to all who have the right to go upon the stream. *Paine v. Wood*, *supra*; *Inhab. of W. Roxbury v. Stoddard*, 7 Allen, 158.

³ *Brackett v. Goddard*, 54 Me. 313; *Isham v. Morgan*, 9 Conn. 374; *Hilton v. Gilman*, 17 Me. 263; *Baker v. Jordan*, 3 Ohio, 438; *Backentoss v. Stahler*, 33 Pa. St. 251; *Foote v. Colwin*, 3 Johns. 222; *Austin v. Sawyer*, 9 Cow. 39; *Clap v. Draper*, 4 Mass. 266; *Canfield v. Ford*, 28 Barb. 336; *Gloninger v. Franklin Coal Co.*, 55 Pa. St. 9; *McIlvaine v. Harris*, 20 Mo. 457; *Chapman v. Long*, 10 Ind. 465; *Todd v. Stokes*, 10 Pa. St. 155; *Cockrill v. Downey*, 4 Kan. 426; *Cook v. Whiting*, 16 Ill. 481; *Gibbons v. Dillingham*, 10 Ark. 9; *Wescott v. Delano*, 20 Wis. 514; *Conklin v. Parsons*, 1 Chand. 240.

with the mill, and which was necessary to such use; and the grant of a house passed the land upon which it is built.¹ Manure made upon a farm is generally considered in this country to be a part of the realty and to pass with the grant of the land.² So, also, has the rolling stock of a railroad been considered a part of the realty, and to pass with a conveyance of the road without any special description of the same.³ The general rule of law is that a permanent annexation to the soil of a thing, in itself personal, makes it a part of the realty. And the rule applies, in some cases, even where the thing annexed is the personal property of another. Thus, if a stranger erects a building upon the land of another, having no estate therein, the building becomes the property of the owner of the soil. And this happens, notwithstanding the stranger acts under a mistaken claim of title.⁴ But if such erection is in pursuance of a license granted by the owner of the soil, then the annexation will not make the building or other structure a part of the realty. A conveyance of the land will not transfer the structure with it, but will operate as a revocation of the license, and compel the owner, within a reasonable time

¹ *Gear v. Burnham*, 37 Conn. 229; *Esty v. Currier*, 98 Mass. 501; *Wilson v. Hunter*, 14 Wis. 683; *Allen v. Scott*, 21 Pick. 225; *Webster v. Potter*, 105 Mass. 414; *Mixer v. Reed*, 25 Vt. 81; *Whitney v. Olney*, 3 Mason, 282; *Davis v. Handy*, 37 N. H. 65.

² *Goodrich v. Jones*, 2 Hill, 142; *Parsons v. Camp*, 11 Conn. 525; *Perry v. Carr*, 44 N. H. 122; *Fay v. Muzzy*, 13 Gray, 53; *Middlebrook v. Corum*, 15 Wend. 169; *Witherby v. Ellison*, 19 Vt. 379; *Plumer v. Plumer*, 30 N. H. 558; *Daniels v. Pond*, 31 Pick. 367.

³ *Minnesota v. St. Paul R. R.*, 2 Wall. 644; *Farmers' Loan, etc., Co. v. Hendrickson*, 25 Barb. 493; *Palmer v. Forbes*, 23 Ill. 300; *State v. Northern R. Co.*, 18 Md. 193. But the better opinion is that the rolling stock of a railroad is personalty. *Randall v. Elwell*, 52 N. Y. 52; *s. c.* 11 Am. Rep. 747; *Hoyle v. Plattsburg, etc., R. R.*, 54 N. Y. 314; *s. c.* 13 Am. R. Rep. 595.

⁴ *Osgood v. Howard*, 6 Greenl. 452; *Aldrich v. Parsons*, 6 N. Y. 555; *Dame v. Dame*, 38 N. H. 429; *Ogden v. Stock*, 34 Ill. 522; *Rogers v. Woodbury*, 15 Pick. 156; *Mott v. Palmer*, 1 Comst. 571; *West v. Stewart*, 7 Pa. St. 122; *Webster v. Potter*, 105 Mass. 416. See *post*, sect. 702, as to erections under a mistake of title.

after such revocation, to remove the structure or lose his right of property therein.¹ But where the person erecting the structure is the owner of the soil, or has an interest in the land, then it is more difficult to determine from the various circumstances under which the question may arise, when the annexation is sufficiently permanent in its character, in order to merge the thing attached into the realty. This subject is known as the law of fixtures.

§ 3. **Fixtures.**—Fixtures are those things, which, personal in their nature, become realty by reason of their annexation to the soil, such annexation being made by some one having an interest in the soil. They are removable or not, according to the circumstances of each case. In the first place, the attachment must be of a permanent and legal character. If there is no attachment or annexation, the thing remains personal property. But the annexation may be *actual* or *constructive*. Actual annexation is where the thing is annexed by actual attachment to the soil, as a house built upon a brick foundation, or fences with posts embedded in the soil. Constructive annexation is where the thing is fitted for use in connection with the premises, and is more or less necessary to their enjoyment, but it is not firmly attached. Such, for example, are keys, movable window blinds, doors, etc. In the second place, since the thing assumes the character of a fixture, because of its annexation to the soil, it must follow, that if there can be a legal severance it will reassume the character of personal property and cease to be a fixture. The right to remove fixtures depends upon the character of the annexation and the effect of severance upon the land, and the relation of

¹ Tapley v. Smith, 18 Me. 12; Russell v. Richards, 10 Mo. 429; Keyser v. School District, 35 N. H. 480; Coleman v. Lewis, 27 Pa. St. 291; Reid v. Kirk, 12 Rich. 54; Yates v. Mullen, 24 Ind. 278; Mott v. Palmer, 1 Comst. 571; Hinckley v. Baxter, 13 Allen. 139; Antoni v. Belknap, 102 Mass. 200; Kutter v. Smith, 2 Wall. 491; O'Brien v. Kustener, 27 Mich. 292; Ham v. Kendall, 111 Mass. 298; Goodman v. Hannibal & St. Joseph R. R., 45 Mo. 33.

the person making the removal to the fixture and to the land.

§ 4. **Between what parties the question may arise.** — Where the person who erected the fixture has a permanent estate in the land, such as a fee, the legal maxim, *quidquid plantatur solo solo cedit*, applies to the fullest extent, qualified only by the rule that the annexation must be of a permanent character. The question, as to the right to remove such a fixture, may arise between (1) heirs and the executor; (2) vendor and vendee; (3) mortgagor and mortgagee. In all three cases, the general rule is, that all annexations of a permanent character pass with the realty respectively to the heir, vendee, and mortgagee, and cannot be removed by the executor, vendor, or mortgagor. Such is the rule, even though the severance might be made without any material injury to the freehold. But the permanent or temporary character of the annexation often presents some difficult questions. It seems that the manner of fastening offers, in most cases, the true solution. If the fastening is firm and secure, then it gives permanency to the annexation, and makes the thing attached an immovable fixture. Such would be engines, boilers, dye-kettles, cotton-gins, and all other kinds of machinery which are firmly attached to the building by rods and bolts passing through the joists and timber, as well as houses and other buildings, erected upon a firm foundation, would, as between the heir and executor, vendor, and vendee, and mortgagor and mortgagee, constitute a part of the realty, and therefore pass with it.¹

¹ Hill v. Sewald, 53 Pa. St. 274; Voorhies v. Freeman, 2 Watts & S. 116; Union Bank v. Emerson, 15 Mass. 159; Noble v. Butterworth, 19 Pick. 314; Richardson v. Copeland, 6 Gray, 536; Tift v. Horton, 53 N. Y. 377; 13 Am. Rep. 937; Potter v. Cromwell, 40 N. Y. 273; Day v. Perkins, 2 Sandf. Ch. 359; Hill v. Wentworth, 28 Vt. 428; Sweltzer v. Jones, 35 Vt. 317; Hays v. Doane, 11 N. J. Eq. 98; Quinby v. Manhattan Cloth, etc., Co., 24 N. J. Eq. 260; Powell v. Monson Co., 3 Mason, 459; Parsons v. Copeland, 38 Me. 537;

§ 5. **Constructive annexation.** — The permanency of the annexation may be presumed from the weight and size of the object, and its suitableness for use and enjoyment on the land on which it rests. Thus a statue of huge dimensions, resting with its pedestal upon a permanent foundation, and erected upon a lawn for the purpose of ornament, was held to be a part of the realty.¹ And where things, though temporarily detached, are permanently used in connection with the land, they are fixtures and pass with the realty. Thus, hop-poles, stacked up in piles, rolls in an iron mill, lying loose in the mill, fencing materials, etc., were held to be fixtures, even though they were at the time detached from the soil.² But where the attachment is only for the purpose of keeping the things steady, and they were not specially adapted to use upon the premises in question, the simple fastening, which may exist, will not give to them the character of permanent fixtures. Thus, looms and cording machines, fastened by screws to the floor, a large ice chest used in a tavern, and other such articles, are personal property, and will not pass with the realty to the heir, vendee, or mortgagee.³ A great many things, such as

Pierce v. George, 108 Mass. 78; *Hill v. Hill*, 43 Pa. St. 521; *McRea v. Central National Bank*, 66 N. Y. 489; *Burnsides v. Twitchell*, 43 N. H. 390; *Green v. Phillips*, 26 Gratt. 752; 21 Am. Rep. 323; *Bealton v. Clawson*, 2 Strobh. 478; *McKim v. Mason*, 3 Md. Ch. 186; *Latham v. Blakely*, 70 N. C. 369; *Richardson v. Borden*, 42 Miss. 71; 2 Am. Rep. 595; *Deal v. Palmer*, 72 N. C. 582; *Alvord, etc., Co. v. Gleason*, 36 Conn. 86; *Sparks v. State Bank*, 7 Blackf. 469; *Brennan v. Whittaker*, 15 Ohio St. 446; *Lands v. Pfeiffer*, 10 Cal. 258; *Stockwell v. Campbell*, 39 Conn. 362; 11 Am. Rep. 393.

¹ *Snedeker v. Waring*, 12 N. Y. 170.

² *Bishop v. Bishop*, 11 N. Y. 123; *Wadleigh v. Janvrin*, 41 N. H. 503; *Hill v. Sewald*, 53 Pa. St. 274; *Voorhies v. Freeman*, 2 Watts & S. 116; *Goodrich v. Jones*, 2 Hill, 142; *Meig's Appeal*, 62 Pa. St. 28; 1 Am. Rep. 372; *Redler v. Barker*, 4 Kan. 445; *Brock v. Smith*, 14 Ark. 431; *McLaughlin v. Johnson*, 46 Ill. 163; *Fulton v. Norton*, 64 Me. 410; *Glidden v. Bennett*, 43 N. H. 306; *Smith v. Price*, 39 Ill. 28.

³ *Murdock v. Gifford*, 18 N. Y. 28; *Cresson v. Stout*, 17 Johns. 116; *Voorhies v. McGinnis*, 48 N. Y. 278; *Gale v. Ward*, 14 Mass. 352; *Union Bank v. Emerson*, 15 Mass. 159; *Park v. Baker*, 7 Allen, 78; *Pierce v. George*, 108 Mass. 78; 11 Am. Rep. 310; *Blanche v. Rogers*, 26 N. J. Eq. 563; *Rogers v.*

rolls in an iron mill, doors, stone steps, etc., which, when actually fitted for use and attached to the premises, are held to be permanent fixtures, remain personal property until so fitted and attached, though they may be deposited upon the land.¹ When the question arises between mortgagor and mortgagee, the fixture is not removable, whether it is annexed by the mortgagor before or after the execution of the mortgage.² The rule as to fixtures is the same between debtor and creditor, and the heir or vendee and the widow, in respect to the premises set out to her for dower.³

§ 6. Question of fixtures between landlord and tenant.—When the question arises between landlord and tenant, or remainder-man and executor of tenant for life,

Brockaw, 25 N. J. Eq. 496; *Swift v. Thompson*, 9 Conn. 63; *Hill v. Sewald*, 53 Pa. St. 274; *Fullam v. Stearns*, 30 Vt. 443; *Wade v. Johnstone*, 25 Ga. 331; *Feimster v. Johnston*, 64 N. C. 259; *Childress v. Wright*, 2 Coldw. 350; *Terry v. Robins*, 13 Miss. 291; *Moore v. Smith*, 24 Ill. 512; *Taffe v. Warnick*, 3 Blackf. 111; *Burk v. Baxter*, 3 Mo. 207; *Graves v. Pierce*, 53 Mo. 423.

¹ *Johnson v. Mehaffy*, 43 Pa. St. 308; *Woodman v. Pease*, 17 N. H. 282; *Burnside v. Twitchell*, 43 N. H. 390; *Peck v. Batchelder*, 40 Vt. 233; *Bliss v. Misner*, 2 Hun, 391; *Noble v. Sylvester*, 42 Vt. 146.

² *Roberts v. Dauphin Bank*, 19 Pa. St. 74; *Richardson v. Copeland*, 6 Gray, 536; *Haskin v. Woodward*, 45 Pa. St. 42; *Crane v. Brigham*, 11 N. J. Eq. 30; *Robinson v. Prestwick*, 3 Edw. Ch. 246; *Voorhies v. McGinnis*, 48 N. Y. 278; *Naples v. Millon*, 31 Conn. 598; *Burnside v. Twitchell*, 43 N. H. 390; *Lynde v. Rowe*, 12 Allen, 100; *Quinby v. Manhattan, etc., Co.*, 24 N. J. Eq. 260; *Millikin v. Armstrong*, 17 Ind. 450; *McKin v. Mason*, 3 Md. Ch. 186; *Cullwick v. Swindell*, L. R. 3 Eq. 249. But the mortgagor may remove the fixtures erected by him, where he has, expressly or by necessary implication, reserved the right to do so. *Waterfall v. Penistone*, 6 E. & B. 876; *Crane v. Brigham*, 11 N. J. Eq. 30; *Burnside v. Twitchell*, 43 N. H. 390; *Crippen v. Morrison*, 13 Mich. 23. A chattel mortgage of the fixture executed before or contemporaneous with its annexation, will have priority over a prior mortgage of the realty. *Tift v. Horton*, 53 N. H. 377; 13 Am. Rep. 537; *Eaves v. Estes*, 10 Kan. 314; 15 Am. Rep. 345. See also *Ropps v. Barker*, 4 Pick. 238; *McClintock v. Graham*, 3 McCord, 553; *Bringloff v. Munzenmaier*, 20 Iowa, 513.

³ *Goddard v. Chase*, 7 Mass. 432; *Farrar v. Chanfettete*, 5 Denio, 527; *Powell v. Monson Co.* 3 Mason, 459; *Hutchman's Appeal*, 27 Pa. St. 209; *Way v. Way*, 42 Conn. 52; *Pemberton v. King*, 2 Dev. 376. Where the debtor is a tenant, and he has the right to remove the fixtures, his judg-

in respect to the fixtures placed upon the land by the tenant for years, and for life respectively, a more liberal rule is followed. The general rule, above alluded to, that everything permanently annexed to the soil becomes a part of the realty, and cannot be removed, still holds good.¹ But there are certain exceptions, which are created in behalf of the tenant in respect to certain classes of fixtures. The tenant is permitted to remove a fixture, which falls within one of these classes, even though firmly affixed to the soil, provided such removal will not result in any permanent and material injury to the freehold. These are (1) trade fixtures; (2) agricultural fixtures; and (3) fixtures for domestic use and convenience. Until lately, the common-law rule was relaxed only in favor of trade fixtures, while agricultural and domestic fixtures received the same strict construction, as is applied to all fixtures between the heir and executor, and other classes above mentioned. The tendency of the law at the present day is to permit the tenant to remove all fixtures he may attach to the soil, which come under one of these classes, and which can be removed without permanent injury to the premises.² Among the fixtures erected for the purpose of trade and manufacture

ment-creditor may under an execution against personal property levy and sever the same from the freehold. *Minshall v. Lloyd*, 2 M. & W. 450; 2 Smith's Ld. Cas. (7th ed.) 217; *O'Donnell v. Hitchcock*, 118 Mass. 401; *Overton v. Williston*, 31 Pa. St. 155; *State v. Bonham*, 18 Ind. 231.

¹ *Elwes v. Maw*, 3 East, 38; 2 Smith's Ld. Cas. 212; *Ford v. Cobb*, 20 N. Y. 344; *Tifft v. Horton*, 53 N. Y. 377; 13 Am. Rep. 537; *Madigan v. McCarthy*, 108 Mass. 376; 11 Am. Rep. 371.

² *Capen v. Peckham*, 35 Conn. 88; s. c. 9 Am. Law Reg. (N. S.) 136; *Seeger v. Pettit*, 77 Pa. St. 437; 18 Am. Rep. 452; *Elwes v. Mawe*, 3 East, 38; 2 Smith's Ld. Cas. 278; *Merritt v. Judd*, 14 Cal. 59; *Harkness v. Sears*, 26 Ala. 493; *Wing v. Gray*, 36 Vt. 261; *Weston v. Weston*, 102 Mass. 514; *Van Ness v. Packard*, 2 Pet. 137; *Perkins v. Swank*, 43 Miles, 349; *Ombony v. Jones*, 19 N. Y. 234; *Dubois v. Kelly*, 10 Barb. 496; *Wall v. Hinds*, 4 Gray, 256; *Peck v. Batchelder*, 40 Vt. 233; *Montague v. Dent*, 10 Rich. 135; *Rogers v. Crow*, 40 Mo. 91; *Hays v. Doane*, 11 N. J. Eq. 84; *Providence Gas Co. v. Thurber*, 2 R. I. 15; *Jarechi v. Philharmonic Society*, 79 Pa. St. 403; *Antoni v. Belknap*, 102 Mass. 193.

by a tenant, which are held to be removable by him at the termination of his tenancy, are the following: Vats and coppers of a soap boiler, cider mills and presses, buildings erected for trade, fire engines in a colliery, kettles in distilleries, store fixtures, etc.¹ Nursery trees are held to be such an agricultural fixture as, when planted by the tenant for the purpose of sale, to be capable of being removed.² So, also, are stoves, gas fixtures, and other articles, erected and attached to the house by the tenant for his domestic use and convenience.³

§ 7. **Time of removal.** — If the tenant desires to exercise the right to remove fixtures, he must do so during his tenancy, or at least while he is in possession and holding over. If the landlord has entered and resumed possession, his right is gone, and the fixtures become the property of the landlord.⁴ But if, at the expiration of his term, the

¹ *Elwes v. Mawe*, 3 East, 33; 2 Smith's Ld. Cas. 278; *Poole's Case*, 1 Salk. 368; *Holmes v. Tremper*, 20 Johns. 29; *Robinson v. Shuler*, 5 Cow. 323; *Ford v. Cobb*, 20 N. Y. 344; *Torrey v. Burnett*, 38 N. J. L. 457; 20 Am. Rep. 421; *Gaffield v. Hapgood*, 17 Pick. 192; *Hanrahan v. O'Reilly*, 102 Mass. 201; *Holbrook v. Chamberlin*, 116 Mass. 155; 17 Am. Rep. 146; *O'Donnell v. Hitchcock*, 118 Mass. 401; *Swift v. Thompson*, 9 Conn. 63; *Van Ness v. Packard*, 2 Pet. 137; *Taffe v. Warnick*, 3 Blackf. 111; *Graves v. Pierce*, 53 Mo. 423; *Cowden v. St. John*, 16 Iowa, 590; *Lanphere v. Lowe*, 3 Neb. 131. See *Guthrie v. Jones*, 108 Mass. 191; *O'Brien v. Kusterer*, 27 Mich. 289.

² *Penton v. Robert*, 2 East, 88; *Miller v. Baker*, 1 Metc. 27; *Whitmarsh v. Walker*, *Id.* 313; *Brooks v. Galster*, 51 Barb. 196; *Maples v. Millon*, 31 Conn. 598; *Price v. Brayton*, 19 Iowa, 309. See *Jenkins v. Gething*, 2 Johns. & H. 520. The tenant cannot remove manure made upon the farm. *Fay v. Muzzey*, 13 Gray, 53; *Lewis v. Jones*, 17 Pa. St. 262; *Ruckmann v. Outwater*, 28 N. J. L. 581. *Contra*, *Smithwick v. Ellison*, 2 Ired. 326.

³ *Beck v. Rebow*, 1 P. Wms. 94; *Lawton v. Lawton*, 3 Atk. 15; *Grymes v. Boweren*, 6 Bing. 437; *Snedeker v. Waring*, 12 N. Y. 170; *Lawrence v. Kemp*, 1 Duer, 363; *Antoni v. Belknap*, 102 Mass. 193; *Vaughen v. Haldeman*, 33 Pa. St. 522; *Hays v. Doane*, 11 N. J. Eq. 84; *Montague v. Dent*, 10 Rich. 135; *Philbrick v. Ewing*, 97 Mass. 133; *Rogers v. Crow*, 40 Mo. 91; *McCracken v. Hall*, 7 Ind. 30.

⁴ *Weston v. Woodcock*, 7 M. & W. 14; *Dingley v. Buffum*, 57 Me. 381; *Leader v. Homewood*, 5 C. B. (N. S.) 543; *Burk v. Hollis*, 98 Mass. 55; *Beers v. St. John*, 16 Conn. 322; *Pugh v. Arton*, L. R. 8 Eq. 626; *Connor v. Coffin*,

tenant accepts a new lease, in which there is no reservation of the right to remove the fixtures erected under the first lease, the tenant's right in the fixture is lost.¹ And if the term is forfeited by any act of the lessee, his assignee or sublessee, has a reasonable time, after such a termination of the lease, in which to remove the fixtures.²

§ 8. **Emblements.** — If growing crops are planted by the owner of the soil, they form a part of the realty. But if they are planted by a tenant, holding under the owner, then they are personalty as regards the owner, at least during the continuance of the tenancy, but as a rule, realty in respect to all others. Whether he has a right to the growing crops, after the termination of his lease, depends upon the certainty or uncertainty of its duration. This right is called emblements. When the termination of the estate depends upon an uncertainty, the tenant or his personal representatives will have emblements, coupled with the right of entry for the purpose of working the crops, until they are ripe for harvesting. This subject will be specially noticed in discussing the characteristics of the different estates.³

§ 9. **Trees.** — As we have seen above, trees constitute a part of realty, being products of the soil, which are not planted annually. If the trunk of a tree is wholly within the boundaries of one man's land, the entire tree belongs to him, even though the branches and roots may find their way

22 N. H. 541; Kutter v. Smith, 2 Wall. 491; Haflick v. Stober, 11 Ohio St. 482; Cromie v. Hoover, 40 Ind. 59; Dubois v. Kelly, 10 Barb. 496; Mason v. Fenn, 13 Ill. 529; Davis v. Moss, 38 Pa. St. 346; Whippley v. Dewey, 8 Cal. 36. In the case of tenants for life or at will, the rule is somewhat relaxed, and they are permitted to remove their fixtures after the expiration of the term. Weston v. Woodcock, 7 M. & W. 14; Ombony v. Jones, 19 N. Y. 234; Haflick v. Stober, *supra*. And the time for removal may at any time be extended by agreement of the parties. Torrey v. Burnett, 38 N. J. L. 457; 20 Am. Rep. 421; McCracken v. Hall, 7 Ind. 30; Van Rensselaer v. Penniman, 6 Wend. 569.

¹ Laughran v. Ross, 45 N. Y. 792; 6 Am. Rep. 173.

² Stansfield v. Portsmouth, 4 C. B. (N. S.) 119.

³ See *post*, sects. 70, 71.

into the land of the adjoining owner. The adjoining owner need not endure this trespass, but may cut off such projecting roots and branches. If the tree stands upon the boundary line, so that a part of the tree is on either side, the tree is then the joint property of both, and neither can remove or injure it without the consent of the other.¹

§ 10. **Double ownership in lands.**—Technically, the law knows no double ownership in lands, or in any other kind of property. But, since land is made up of composite elements, the soil itself, the trees, and other products and annexations upon it, and the minerals and other deposits under it, it may be divided up into these elements, so that one man may own the trees and erections, another the surface, and a third a mine beneath. A sale of the trees, if it satisfies the requirements of the Statute of Frauds, by being in writing, gives to the vendee a right of property in the standing trees, with the right to enter upon the land for the purpose of cutting and transporting them.² But if the contract be executory, and not in the nature of a deed, then no title to the standing trees passes to the vendee. He simply has a license to come upon the land and cut them.³ So there may be a separate right of property in a house, or a room, or in a mine.⁴

¹ *Masters v. Pollie*, 2 Roll. Rep. 141; *Hutchings v. King*, 1 Wall. 59; *Holder v. Coates*, 1 Moo. & M. 112; *Skinner v. Wilder*, 38 Vt. 115; *Lyman v. Hale*, 11 Conn. 177; *Dubois v. Beaver*, 25 N. Y. 123; *Hoffman v. Armstrong*, 48 N. Y. 201; *Griffin v. Bixby*, 12 N. H. 454; 3 Kent's Com. 438; 1 Washb. on Real Prop. 11, 12.

² *Carrington v. Roots*, 2 M. & W. 248; *Warren v. Leland*, 2 Barb. 613; *Pattison's Appeal*, 61 Pa. 297; *Whipple v. Foot*, 2 Johns. 423; *Green v. Armstrong*, 1 Denio, 550; *McGregor v. Brown*, 10 N. Y. 117; *Drake v. Wells*, 11 Allen, 144; *Clap v. Diaper*, 4 Mass. 266; *Kingsley v. Holbrook*, 45 N. H. 319; *Gardiner Mfg. Co. v. Heald*, 5 Greenl. 11 Allen 144; *Knotts v. Hydrick*, 12 Rich. 314; *Westcott v. Delano*, 20 Wis. 516; *Rich v. Zeilsdorf*, 22 Wis. 544; See *post*, sect. 799.

³ *Drake v. Wells*, 11 Allen, 142; *Douglass v. Shumway*, 13 Gray, 502; *Clark v. Way*, 11 Rich. 621; *Nettleton v. Sikes*, 8 Metc. 35. See *post* sect. 799.

⁴ *Harris v. Ryding*, 5 M. & W. 60; *Stoughton v. Lee*, 1 Taunt. 402; *Stock-*

§ 11. **Lands, tenements, and hereditaments.** — What is included under the term lands, has been discussed in the preceding pages. *Tenements* are those things which can be **HOLDEN**. It is a word derived from the feudal system, and signifies anything which is held in tenure. *Hereditament* is any property which is heritable. Hereditaments are of two kinds, *corporeal*, that is, everything of a substantial nature, such as lands, houses, mines, etc.; *incorporeal*, or those species of real property, which are not tangible, and are more properly rights in, than rights to, or of, real property. The Roman *jura in re alieno*, comprise to some extent this class of rights of property.

well v. Hunter, 11 Metc. 448; *Adams v. Briggs*, 7 Cush. 361; *Canfield v. Ford*, 28 Barb. 336; *Gloninger v. Franklin Coal Co.*, 55 Pa. St. 9; *Proprietors v. Lowell*, 1 Metc. 538; *Otis v. Smith*, 9 Pick. 293; *Shades v. McCormick*, 4 Iowa, 375; *Cheeseborough v. Green*, 10 Conn. 318; *Green v. Putnam*, 8 Cush. 21; *Caldwell v. Fulton*, 31 Pa. 475; *Clement v. Youngmann*, 40 Pa. St. 344; *Zinc Co. v. Franklinite Co.* 13 N. J. 322. See *post*, sects. 620, 621, as to the duties of such "double" owners.

CHAPTER II.

THE PRINCIPLES OF THE FEUDAL SYSTEM.

SECTION 19. What is tenure.

20. Feudal tenure.
21. Feud or Fief.
22. Subinfeudation.
23. The manor and its system of dividing up its lands.
24. Feoffment and livery of seisin.
25. Tenure in the United States.
26. Estates, classes of.

§ 19. **What is tenure.** — It may be stated as a general rule, though controverted by eminent authority, that in any system of jurisprudence, there cannot be an absolute ownership in lands. The right of property or interest in them must always be qualified, that interest being known in the English and American law as an *estate*. A man can have only an estate in the land, the absolute right of property being vested in the State. An estate has, in respect to real property, the three elements, the right of possession, right of enjoyment, and right of disposition, subject to the right of the State to defeat it, and appropriate it to the public use, or for the public good. In what cases, and under what circumstances, the State can exercise this power of appropriation, and to what extent the rights of possession, enjoyment and disposition may be limited by the imposition of restrictions, depends upon the policy of each system of jurisprudence. In some States the restrictions are numerous, while in others they are few, the right of property being almost absolute in the individual. But nowhere can the private right of property be said to be absolute. The absolute right of property being in the State, the right of ownership, which an individual may acquire,

must, therefore, in theory at least, be held to be derived from the State, and the State has the right and power to stipulate the conditions and terms, upon which the land may be held by individuals. These conditions and terms, and the rights and obligations arising therefrom, constitute what is known as *tenure* or *land tenure*.

§ 20. **Feudal tenure.**—The English common law of real property, the source of our own law, is founded upon the doctrines of the feudal system. It is not proposed to present here a detailed account of that barbaric system; for, although it long survived the necessities of the barbaric life, which brought it into existence, it has for some time ceased to exist, and only prevailed in this country to a limited extent. But a passing notice must be given to it, in order to explain the terms and phrases, which have been handed down to us from the feudal age, and which we now find in daily application to the law of real property.¹ According to the feudal theory, all estates were derived from the king. He was called the *lord paramount*, and in him was vested the absolute right of property. As a return or compensation for the possession and enjoyment of the land, the owners, or, as they were called, vassals, were obligated to render the king certain services, the failure to perform which defeated the estate, and caused it to revert to the lord paramount. The obligation of citizenship, apart from the obligations of a tenant of lands, was unknown to the feudal age.² It is not known positively whether the feudal system prevailed to any extent under the Saxon laws;³ but

¹ The present chapter is constructed on the supposition that the student is familiar with the history of the feudal system as presented by Blackstone, and it, therefore, consists only of odds and ends, which serve rather as suggestions, than explanations, of the feudal system, and are designed to call the reader's special attention to those principles which still continue to be of peculiar value to the American student.

² 1 Washb. on Real Prop. 46, citing 3 Guizot. Hist. Civ. 108.

³ Washburne cites, as holding the affirmative, Coke, Selden, Sir Wm. Temple, Dalrymple, Miller, Turner, and Spencer; and supporting the nega-

certainly it is not met with, in its thorough and complicated organization, until the conquest. Upon his accession to the throne of England, William of Normandy, either by confiscation or surrender, voluntary or involuntary, brought about the general establishment of the feudal system. The lands of those who fought under the banner of Harold at Hastings were confiscated and distributed among the Norman chiefs. And subsequently, in order to obtain the protection guaranteed to all vassals, most of the other land-owners surrendered their lands and received them back as vassals of the king. The lands were distributed among the chiefs, both Saxon and Norman, who swore allegiance to the king, and obligated themselves to render certain services, principally military in their character. These chiefs were known as barons. They then parcelled out the lands allotted to them among their adherents or vassals, who, in return therefor, performed services to their barons or lords.

§ 21. **Feud or Fief.** — When land was conveyed to the tenant or vassal it was called a feud, fief or fee. It was at first only for the life of the tenant. Under the early feudal system an estate of inheritance was unknown. Afterwards

tive, Chief J. Hale, Craig, Spelman, Camden, Sir Martin Wright, Somner, Blackstone, and Barrington. 1 Washb. on Real Prop. 38. See also, 2 Bla. Com. 48; Co. Lit. 76 b.; 1 Spencer Eq. Jur. 9; Williams on Real Prop. 2, 3; 1 Stubbs Const. Hist. Eng. 273, 274. Mr. Hallam says: "Whether the law of feudal tenures can be said to have existed in England before the conquest, must be left to every reader's determination. Perhaps any attempt to decide it positively would end in a verbal dispute. In tracing the history of every political institution, three things are to be considered, the *principle*, the *form*, and the *name*. The last will probably not be found in any genuine Anglo-Saxon record; of the form of the peculiar ceremonies and incidents of a regular fief, there is some, but not much, appearance. But they who reflect upon the dependence in which free and even noble tenants held their estates of other subjects, and upon the privileges of territorial jurisdiction, will, I think, perceive much of the intrinsic character of the feudal relation, though in a less mature and systematic shape than it assumed after the Norman Conquest." Hallam's Middle Ages, p. 88.

it became customary to grant a fief or feud to a tenant and his sons, and subsequently to him and his heirs.¹ For a long time after the conquest a vassal could not alien his land without the consent of the lord. It was a personal confidence reposed in him, and a full power of alienation would have enabled him to let an enemy of the lord into possession of his lands. A similar rule prevailed in respect to the alienation of the manor by the lord. The consent of the tenant had to be obtained.² But the tenant, notwithstanding, had a restricted power of alienation, known as

§ 22. **Subinfeudation.**—The tenant could let out the land granted to him to sub-tenants, who rendered services to the tenant, while the tenant remained under obligation to the lord for the services due to him. There was then no such thing as absolute alienation. The conveyance always provided that the grantees should hold as tenants of the grantor, and render certain specified services to the grantor.³ But the doctrine of subinfeudation was abolished by the statute *Quia Emptores*, 18 Edw. 1., and the tenant was given instead a free power of alienation.⁴ The purchaser was by the statute substituted in the place of the tenant in respect to the services to be rendered to the lord. But this statute, as well as the *magna charta*, only prohibited subinfeudation of the entire feud. In a grant, therefore, of a less estate than the one owned by the tenant, subinfeudation may still take place.⁵ The services, which the tenant was under obligation to render to the lord, varied in character with the tenure under which they held the land, and this brings us to the explanation of

¹ 1 Washb. on Real Prop. 40, 41, 51, 52.

² 1 Washb. on Real Prop. 51; 2 Bla. Com. 57; 1 Spence Eq. Jur. 137.

³ 1 Washb. on Real Prop. 53, 54; Williams on Real Prop. 3, 4; 1 Spence Eq. Jur. 137.

⁴ 1 Washb. on Real Prop. 54, 55.

⁵ For a common example of modern subinfeudation, see *post*, sect. 182, where an assignment is distinguished from a sublease.

§ 23. **The manor, and the system of dividing up its lands among the tenants.** — The sections or parcels, into which the land was divided, were called manors and seignories. The lord reserved such a portion of the manor land as was necessary or desirable for his own private use. The remainder was divided into four parts or parcels. One part for the tenants, from whom he expected military service in defence of himself and his lands, and therefore this land was held under *military* tenure. It was also called a *proper* feud, as distinguished from *improper* feuds, which constituted a second part of the manor lands given to tenants, who were obliged in return for the feud fuit, to give to the lord a certain proportion of the crops, or to plough the lord's land. This was called *socage* tenure. A third part was given to the lord's *villeins* who did the menial services upon the manor, and were a species of agricultural slave, which was quite common under the feudal system, and has existed in Russia within the memory of the present generation. The origin of the word *villein* is very doubtful, some deriving it from *villa*, a country farm (Washburne). It is certain, however, that they were not all *villains*. The fourth part was the waste land, consisting of woodland, from which the tenants were permitted to obtain their *estovers*, and of meadow land on which they fed their cattle.¹ The *villeins* possessed only what were known as *copyhold* estates. The copyhold has never obtained in this country, and there will be no further mention of them. The other tenants, being freemen, were given, what were called *freehold* estates. The freehold was at least an estate for the life of the tenant, "it being considered," Mr. Blackstone says, "that the smallest interest, which was worthy of a freeman, was one which must endure during his life."² The term *feud* is properly applicable only to freeholds.

¹ 1 Washb. on Real Prop. 45-48; 1 Spence Eq. Jur. 52-95; Williams on Real Prop. 48, 119.

² 2 Bla. Com. 237.

§ 24. **Feoffment and livery of seisin.** — The transaction by which a feud was conveyed to a tenant was called a *feoffment*, and the operative ceremony, *livery* or *investiture* of *seisin*. It will not be necessary to describe this ceremony in the present connection, especially since a detailed account of it is given elsewhere.¹ *Seisin* is an old legal term, which means *possession*; but since the livery of seisin was an incident only of freehold estates, it has come to have the more qualified signification of the possession, which is given to a tenant of the freehold. The seisin, in legal contemplation, is the estate itself; and, as there can be but one seisin in fee, he who has not the seisin cannot technically be said to have the estate.² There are two kinds of seisins, *seisin in fact*, and *seisin in deed* or *in law*. *Seisin in fact* is inseparable from actual possession. *Seisin in law* is that seisin or right to seisin *in fact*, which one may have, while not in actual possession. Thus if A. is tenant for years, and B. has the remainder in fee, A. has the actual possession, but no seisin, since seisin is not an incident of leaseholds. But B. has the seisin *in law*, which, when coupled with the subordinate possession of A., will be equivalent to the seisin *in fact*. But if A. is tenant for life, he takes the whole seisin in fact for the benefit of his own life estate, and in trust for B. The subject will be more fully presented, and its importance explained, in the chapter on Remainders.³

§ 25. **Tenure in the United States.** — In the charters of the American Colonies, it was expressly provided that the lands shall be held by the tenure of “free and common socage, and not *in capite* by knight-service.” Therefore it may be said that, at an early day, feudal tenures existed in this country to a limited extent.⁴ But at the present

¹ See *post*, sect. 770.

² See *post*, sects. 693, 694.

³ See *post*, sects. 397, *et. seq.*, and sects. 693, 694, 695.

⁴ 1 Washb. on Real Prop. 63, 64; Williams on Real Prop. 6, Rawle's note.

day, with the exception of a few manors still existing in the State of New York, there is little, if any, trace of them remaining in the American law of real property. And so obsolete has the ancient doctrine of tenures become, that writers of eminence unhesitatingly pronounce the lands in this country to be absolutely allodial, *i.e.*, free from the burdens of tenure.¹ But all lands are held subject to the exercise of the right of *eminent domain*, the right to appropriate private lands to public uses, and subject furthermore to the right of the State to control its use, so as not to be detrimental to the public welfare.² These restrictions upon the right of property are not feudal in their character; and since in most State Constitutions it is provided, that in the exercise of the right of eminent domain full compensation must be made to the owners of the land appropriated, the right is more properly one which the sovereignty claims in respect to everything which affects the commonwealth. But the fact, that there is no practical tenure of lands at present, does not affect the position assumed in a preceding paragraph.³ The State has the right to impose burdens, if consistent with its policy and the public welfare, although it may not exercise it. There is, however, a species of tenure, still existing and fully recognized in the United States, between tenants of particular estates and reversioners or remainder-men, and burdens are permitted to be imposed upon the tenant. Even where there are no special

In *Chisholm v. Georgia*, 2 Dall. 470, Ch. J. Jay says: "Every acre of land in this country was then, prior to the revolution, held mediately or immediately by grants from the crown."

¹ *Van Rensselaer v. Smith*, 27 Barb. 157; *Cornell v. Lamb*, 2 Cow. 652; *Coombs v. Jackson*, 2 Wend. 155; *Van Rensselaer v. Hays*, 19 N. Y. 91; *Van Rensselaer v. Dennison*, 35 N. Y. 400. Pom. Introduc. 272; 3 Kent's Com. 513.

² 1 Washb. on Real Prop. 65; *The Commonwealth v. Tewksbury*, 11 Mete. 57; *The Commonwealth v. Alger*, 7 Cush. 92; *Taylor v. Porter*, 4 Hill, 143; *The People v. Salem*, 20 Mich. 479.

³ See *ante*, sect. 19.

burdens of tenure, there is always the implied tenure which prevents the tenant from denying the title of his landlord.¹

§ 26. **Estates, classes of.** — In the classification of the estates, which may be created in lands, four principal circumstances tend to determine their natural subdivision: *First*, the *quantity* or *duration* of the interest; *secondly*, the quality of the interest; *thirdly*, the time of enjoyment; and *fourthly*, the number of owners. Under the head of quantity, the first division is into *freeholds* and estates *less than freehold*. Freeholds are then subdivided into *freeholds of inheritance* and *freeholds not of inheritance*. A freehold is one which is to endure for an uncertain period, which must, or at least may, last during the life of some one, it may be the grantee, grantor, or some other person. Estates less than freehold, or *leaseholds*, are those which are limited to endure for a certain or uncertain number of years, the uncertainty, if any, being determined by the will of either or both parties. And they are subdivided into estates *for years*, *at will*, *from year to year*, and *at sufferance*. Estates under the second heading are distinguished by their qualities. Thus estates may be either *absolute* or *determinable*. A determinable estate is one which may be determined, before the natural expiration of its period of limitation by the happening of some contingency. Determinable estates are of four kinds: estate *conditional at common law* or *estate tail*, estate *upon condition*, estate *upon limitation*, and *conditional limitation*. In respect to their quality, estates are also divided into *legal* and *equitable* estates. A legal estate is one which arises under, and is recognized by the common or statutory law; an equitable estate is the product of equity jurisprudence, and is cognizable solely in courts of equity. In reference to the time of enjoyment, estates are divided into two classes: estates in possession, that is, those to which the right of possession

¹ See *post*, sects. 65, 199.

is immediate ; and estates in expectancy, which are to take effect in possession at some future time. Estates in this connection may also be divided into *executed* or *executory*, *vested* or *contingent*. An executed estate is one in which the right of possession is immediate. An executory estate is one which takes effect in possession at a future time. A vested estate is one to which there is a present fixed title, and concerning whose title there is no uncertainty. A contingent estate is one to which there is only a possibility of acquiring a title at some future day, upon the happening of some definite contingency. A *vested* estate may be either *executed* or *executory*. Thus an estate for life is a vested and executed estate, while a reversion or vested remainder is a *vested* and *executory* estate. An *executed* estate must, and can only, be *vested*. There cannot be an *executed contingent*, or a contingent executed, estate. But an *executory* estate may be either *vested* or *contingent*. Thus a remainder to A. after an executed estate to B., is a *vested*, *executory* estate ; while a remainder to the heirs of A., A. being still alive, and therefore his heirs not yet ascertained, is an *executory contingent* estate. In the fourth classification, estates are considered in respect to the number of persons in whom the right of property is vested ; and from that standpoint they are divided into two classes ; estates in severalty, or those owned by one person, and joint estates, which are vested in two or more persons. According to the peculiar rights which the individual co-tenants of joint estates have in them, they are subdivided into five classes : joint tenancy, tenancy in common, tenancy in coparcenary, tenancy by the entirety, and estate in partnership. Keeping these elements in mind we deduce the following table of estates.

TABLE OF ESTATES.

FREE-HOLDS.	{	Estates less than Inheritance.	{	Conventional Life Estates.	{	Estate for one's own life. Estate for the life of another. Estate for an uncertain period which may last during life. Estate tail after possibility of issue extinct.
Estates less than Freehold or Leaseholds.	{		{	Legal Life Estates	{	Estate during coverture. Curtesy. Dower. Homestead.
Estates in Severalty.....	{		{	Joint Estates.	{	Estate for years. Estate at will. Estate from year to year. Estate at sufferance.
Absolute Estates.....	{		{	Determinable Estates.	{	Joint tenancy. Tenancy in common. Tenancy in coparcenary. Tenancy in entirety. Tenancy in partnership.
Estates in Possession.....	{		{	Estates in Expectancy.	{	Fee conditional. Estate upon limitation. Conditional limitation. Estate upon condition. Mortgages.
Legal Estates.....	{		{	Equitable Estates.	{	Reversion. Remanders. Contingent uses. Springing uses. Shifting uses. Executory devises.
	{		{		{	Uses. Trusts. Mortgage by deposit of title deeds. Vendor's and Vendee's lien.

CHAPTER III.

ESTATE IN FEE SIMPLE.

SECTION 36. Definition.

37. Words of limitation.

38. The power of disposition.

39. Liability for debts.

§ 36. **Definition.** — A fee simple is a freehold estate of inheritance free from conditions and of indefinite duration. It is the highest estate known to the law, and is absolute, so far as it is possible for one to possess an absolute right of property in lands.¹ The word *fee* without any qualifying adjective implies an unlimited estate of inheritance. Such is also the case with the term “fee simple absolute.” The three terms “fee,” “fee simple,” and “fee simple absolute,” may be used interchangeably;² the adjectives in the last two are surplusage, and are generally used for the purpose of distinguishing that class of estates from those which are called base or qualified fees.

§ 37. **Words of Limitation.** — The word “heirs” at common law is required to be used in limiting a fee simple, where the estate is acquired by conveyance *inter vivos*. And no equivalent words, which indicate the intention of the grantor to convey an absolute right to the property, will suffice. If the conveyance be not made to one and his heirs, the grantee will take only an estate for his life, notwithstanding the estate is limited by such phrases, as “to A. forever,” or “to A. and his successors,” or to his *chil-*

¹ Co. Lit. 1 a. n.; 2 Bla. Com. 106; 1 Washb. on Real Prop. 76.

² 2 Bla. Com. 106; Co. Lit. 1 b.; 1 Prest. Est. 420; 2 Washb. on Real Prop. 76, 77.

dren or *issue* or *assigns*, and the like. An express direction that the grantee is to have a fee simple estate, will not supply the place of the word "heirs."¹ But if the estate be acquired by devise or by legislative grant, the technical word "heirs" is not necessary. The intention to create a fee simple estate may in such cases be manifested by any other words or forms of expression.² On the other hand, if the word "heirs" appears from the context of the will to have been used by the testator as a word of purchase, it will be given that construction, and the devisee will take only a life estate, while his heirs will take a contingent remainder, notwithstanding that ordinarily the rule in *Shelley's Case* would make it a fee simple estate in the first devisee.³ And if the conveyance be to a corporation the word "successors" takes the place of heirs, since a corporation cannot have heirs.⁴ All technical quit-claim deeds pass whatever interest the grantor has, without words of limitation, as in the case of a release from one joint tenant to another, or by a disseissee to the disseisor.⁵ But a partition between tenants in common by mutual grants or by release would require the words of

¹ Co. Lit. 8 b.; 2 Prest. Est. 3, 8; 4 Kent's Com. 6, note; 1 Spence Eq. Jur. 139; *Sedgwick v. Lullin*, 10 Allen, 430; *King v. Barnes*, 13 Pick. 24; *Adams v. Ross*, 30 N. J. L. 511; *Clearwater v. Rose*, 1 Blackf. 137; *Foster v. Joice*, 3 Wash. C. Ct. 498. But if reference is made to another deed for a description of the estate granted, the words of limitation may be omitted, if they are contained in the reference deed. 1 Washb. on Real Prop. 88. See, also, *post*, sect. 841.

² *Rutherford v. Greene*, 2 Wheat. 196; *Bridgewater v. Bolton*, 6 Mod. 109; *Newkirk v. Newkirk*, 2 Caines, 345; *Jackson v. Housell*, 17 Johns. 281; *Godfrey v. Humphrey*, 18 Pick. 537; *Baker v. Bridge*, 12 Pick. 27; 2 Bla. Com. 108; 1 Washb. on Real Prop. 85.

³ *Urich's Appeal*, 86 Pa. St. 386; 27 Am. Rep. 707.

⁴ But no words of limitation, not even "successors," are necessary in the grant of a fee to a corporation, unless it be a corporation sole. *Cong. Soc. v. Stark*, 34 Vt. 243; *Wilcox v. Wheeler*, 47 N. H. 490; *Beach v. Haynes*, 12 Vt. 15; *Overseers v. Sears*, 22 Pick. 126; 2 Prest. Est. 43; *Ang. & Ames on Corp.*, ch. V., sect. 1. See *Nicoll v. N. Y. & Erie R. R.*, 12 N. Y. 400.

⁵ 1 Washb. on Real Prop. 54. See *post*, sect. 238. The rule is the same in a release by the tenant for life to the reversioner. 2 Prest. Est. 58.

limitation. So would the release of a reversion to the tenant for life.¹ But where there is a trust imposed upon the grantee or devisee, a fee will be implied, if the trust cannot be supported or performed without a fee.² And if by devise a charge is imposed upon the devisee to pay a certain sum of money, a fee will be implied, without the use of any words of limitation whatever. This is the case, however, only when the charge is an absolute personal liability of the devisee. If the money is directed to be paid out of the rents and profits of the estate, and the devisee assumes no personal liability, in case of the failure of the rents and profits, he will take only a life estate, if there is nothing else in the will indicating the intention that he shall have a fee.³ In England and in most of the States of this country, the rule has been changed, so that in a devise of real property the intention to convey a fee simple will be presumed, in the absence of an express intention to the contrary.⁴ In these States, a devise to A. would now give him a fee, while formerly he would only have taken a life estate. This abrogation of the common-law rule has also in some of the States been extended to conveyances *inter vivos*.⁵ The rule had in the course of time become

¹ 2 Prest. Est. 56-62. See *post*, sect. 239.

² *White v. Woodbury*, 9 Pick. 136; *Sears v. Russell*, 8 Gray, 89; *Newhall v. Wheeler*, 7 Mass. 189; *Gould v. Lamb*, 11 Metc. 84; *Fisher v. Fields*, 10 Johns. 505; *Koenig's Appeal*, 57 Pa. St. 252; *Angell v. Rosenbury*, 12 Mich. 266. See *post*, sect. 503.

³ *Doe v. Richards*, 3 T. R. 356; *Lithgow v. Kavenagh*, 9 Mass. 161; *Baker v. Bridge*, 12 Pick. 27; *Godfrey v. Humphrey*, 18 Pick. 537; *Wait v. Belding*, 24 Pick. 138; *Jackson v. Merrill*, 6 Johns. 185; *Jackson v. Bull*, 10 Johns. 148.

⁴ Such is the law in Alabama, Arkansas, Georgia, Iowa, Illinois, Kentucky, Maryland, Massachusetts, Mississippi, Missouri, Nebraska, New Hampshire, New York, New Jersey, North Carolina, South Carolina, Texas, Virginia; 1 Washb. on Real Prop. 52, note 3, 86, note 3; Williams on Real Prop. 20, 1.

⁵ Such is the case in Alabama, Arkansas, Georgia, Illinois, Iowa, Kentucky, Mississippi, Missouri, Nebraska, New Hampshire, New York, Maryland, Tennessee, Virginia, Texas. 1 Washb. on Real Prop. 52, note 3; 2 Greenl. Cruise, 354; Williams on Real Prop. 19, note 1.

purely arbitrary, the reasons for the same having long since passed away with the advancement of civilization.

§ 38. **The Power of Disposition.** — Originally the highest estate granted to a tenant was an estate for life, and when afterwards lands were granted to one and his heirs forever, the heirs were deemed to be co-equal grantees or donees with the first taker. In consequence, the power of alienation was not given to the owner of such an estate. Subsequently he was allowed to alien it with the consent of the lord and the presumptive heir.¹ Then in the time of Henry I. and II., the right was given to defeat the inheritance of all the heirs except the oldest son.² Successive changes of this character took place from time to time, until the free right of alienation was given by the statute of *Quia Emptores*, as an inseparable incident to an estate in fee.³ And to such an extent is this right guarded by the statute, that a condition in absolute restraint of alienation is made void.⁴ To what extent the power of alienation may be restricted, will be shown in the subsequent chapter on estates upon condition.⁵ The statute *Quia Emptores* refers only to alienation *inter vivos*. For a long period in the history of the common law, it was impossible to make a disposition of a freehold by will. But in the thirty-second year of the reign of Henry VIII., a statute was passed, which permitted a devise of real estate. The power of devising lands by will was enjoyed in the time of the Saxons, but was abolished by the introduction of the Norman feudal system, except in certain favored localities,

¹ 1 Spence Eq. Jur. 157; Maine Acc. Law, 230; 1 Washb. on Real Prop. 78, 79.

² 1 Spence Eq. Jur. 138; 1 Washb. on Real Prop. 79.

³ Williams on Real Prop. 61, 62; 1 Washb. on Real Prop. 79; Co. Lit. 43 b.

⁴ 1 Prest. Est. 477; Bradley v. Peixoto, 3 Ves. jr. 824; Blackstone Bank v. Davis, 21 Pick. 42; McWilliams v. Nisley, 2 Serg. & R. 507; Stewart v. Brady, 3 Bush, 623.

⁵ See *post*, sect. 275.

which were exempt from the burdens and restrictions of that system.¹

§ 39. **Liability for debts.** — This was not originally an incident of freehold estates. They were first made liable to execution for the debts of the owner during his life time by the statute 13 Edw. I., ch. 18. But there was no provision in the English law, until Stat. 3 and 4, Will. IV., ch. 104, for subjecting the estates of decedents to the satisfaction of all the debts of the ancestor. In this country lands are generally liable for the debts of the owner, in all forms of actions, before and after his death, and in the hands of his heirs and devisees.²

¹ See *post*, sect. 872.

² 1 Greenl. Cruise, 60 n.; *Watkins v. Holman*, 14 Pet. 63; *Wyman v. Briglen*, 4 Mass. 150; see *post*, sect. 757; *Bellas v. McCarthy*, 10 Watts, 31; 4 Kent's Com. 420; *Williams on Real Prop.* 81, Rawle's note.

CHAPTER IV.

ESTATES TAIL.

SECTION 44. Base or qualified fees.

45. Fee conditional at common law.
46. Estates tail.
47. Necessary words of limitation.
48. Classes of estates tail.
49. How estates tail may be barred.
50. Merger of an estate tail.
51. Estate-tail after possibility of issue extinct.
52. Estates-tail in the United States.

§ 44. **Base or qualified fees.** — Whenever a fee is so qualified, as to be made to determine, or liable to be defeated, at the happening of some contingent event or act, the fee is said to be base, qualified, or determinable. There are four classes of such fees, viz: fee upon condition, fee upon limitation, a conditional limitation, and a fee conditional at common law. Some authors apply the term *base fee* solely to the last class; but for all practical purposes, either of the above names may be applied to either or all.¹ The first three classes will be treated at length in the chapter on estates upon condition.²

§ 45. **Fee conditional at common law.** — At an early day, as far back as the time of Alfred, it was the custom to limit estates to one and particular heirs, instead of his heirs in general. Generally, it was to the heirs of his body, — *i.e.*, his issue, his lineal heirs. But it can be limited

¹ 1 Washb. on Real Prop. 88-91; 2 Bla. Com. 109; 1 Prest. Est. 466-475; Seymour's Case, 10 Rep. 97; 1 Spence Eq. Jur. 144.

² See *post*, sects. 271-281.

to any other class of heirs. If the first taker died leaving no heir of that kind, the estate was defeated and reverted to the donor. But as soon as that class of heirs came into being, as, in the case of an estate to one and the heirs of his body, upon the birth of a child, the condition was held to be so far performed as to permit the tenant to alien or charge the land in fee simple. And the subsequent death of the issue would have no effect upon the purchaser's title.¹ But, if no alienation was made during the life of such heirs presumptive it would revert to the donor upon the death of the tenant, just as if they had never come into being.²

§ 46. **Estates tail.** — In consequence of the readiness with which fees conditional could be converted into a fee simple, great dissatisfaction was felt and manifested by the nobles and landed gentry. It had been their custom to settle their great estates upon their oldest sons and their issue, in order to keep them within their families, and prevent their subdivision into smaller estates. When fees conditional were made by judicial legislation capable of alienation upon the birth of issue, the protection to their entails was taken away, and the barons applied to King Edward I. to grant them a remedy. In compliance with this appeal, the statute “*De Donis Conditionalibus*” was passed in the thirteenth year of the reign of Edward I. By this statute *fees conditional*, which were limited to the heirs of one's body, were made inalienable under any circumstances. It was held that the heirs do not take as purchasers, but as special heir; nevertheless, the ancestor could not by any act of alienation defeat their interest in the estate.³

¹ 2 Bla. Com. 111; 2 Inst. 333; Co. Lit. 19 a, note 110; 1 Spence Eq. Jur. 21, 141; *Buckworth v. Thirkell*, 3 B. & P. 652; *Williams on Real Prop.* 42; *Nevil's Case*, 7 Coke, 34 b.

² 2 Inst. 332; 1 Spence Eq. Jur. 141; *Williams on Real Prop.* 42, 43.

³ 2 Prest. Est. 378-380; 2 Bla. Com. 112-116; 2 Inst. 332, 333; 1 Washb. on Real Prop. 94, 95.

The fee conditional was then called estate tail. Estates tail, therefore, to quote Mr. Washburn's definition, "are estates of inheritance, which, instead of descending to heirs generally, go to the heirs of the donee's body, which means his lawful issue, his children, and through them to his grandchildren, in a direct line, so long as his posterity endures in a regular order and course of descent, and upon the death of the first owner without issue, the estate determines."¹ The tenants in tail cannot alien the estate, but it has all the other characteristics of a fee simple. The tenant can freely commit waste; nor is he under any obligation to the reversioner to pay off an incumbrance or keep down the interest on it.²

§ 47. **Necessary words of limitation.** — In the creation of an estate tail words of limitation must be used, which indicate clearly what heirs are to take. The usual form of limitation is to one and the heirs of his body. But any other equivalent expressions would be sufficient, provided the word "heirs" was not omitted.³ The same distinction as to construction between estates created by deed and by will, mentioned in connection with fees simple, applies here. So that in the case of a devise, an estate will be held to be one in tail, whatever may be the words of limitation used. Thus a devise to A. and his seed, or his issue, or

¹ 1 Washb. on Real Prop. 99; 2 Prest. Est. 360; Williams on Real Prop. 43, 44.

² Co. Lit. 224 a; 2 Bla. Com. 115; Liford's Case, 11 Rep. 50; Jervis v. Benton, 2 Vern. 251; Chaplin v. Chaplin, 3 P. Wms. 229. But a receiver may be appointed to collect the rents and profits of an estate tail to keep down the interest on incumbrances. Story's Eq. Jur., sect. 835; Bertie v. Abingdon, 3 Merw. 560. Dower and curtesy are incidents of estates tail. 1 Washb. on Real Prop. 107; Co. Lit. 224 a; *post*, sects. 104, 116. Tenant in tail cannot charge the inheritance with his debts and obligations after his death. Liford's Case, 11 Rep. 50; Wharton v. Wharton, 2 Vern. 3; Partridge v. Dorsey, 3 Har. & J. 302; 1 Cruise Dig. 84; Williams on Real Prop. 57, 58. But his interest in the same, viz., his life estate may be sold for the satisfaction of his debts. 1 Washb. on Real Prop. 107; Williams on Real Prop. 58, 59.

³ 2 Prest. Est. 480-482-485; 1 Washb. on Real Prop. 104, 105; Co. Lit. 20 b; 2 Bla. Com. 115.

his heirs male, etc., all showing an intention to create an estate tail, would be held a good limitation of an estate tail.¹ And very often the gift will be construed to be an estate tail, where there is no direct limitation to the heirs of his body, as where there was a grant to A. and if he should die without issue of his body, then to B. The intention is so clear that B. is to have it only after the termination of what would be an estate tail, that A. was held to have such an estate by implication.²

§ 48. **Classes of estates tail.** — If the estate be limited generally to the heirs of one's body, it is called an estate tail general. If it be limited to particular heirs of the body, as to the heirs of one's body upon the body of a certain named wife begotten, only the issue of that particular wife can take, and it is called an estate tail special. The issue of any other wife cannot take.³ The special tail, in order to be good, must be so limited as not to be unlawful.⁴ But it does not matter how improbable the marriage

¹ 2 Bla. Com. 115; Co. Lit. 27 a; *Nightingale v. Burrell*, 15 Pick. 104; *Arnold v. Brown*, 7 R. I. 196; *Hill v. Hill*, 74 Pa. St. 173; s. c., 15 Am. Rep. 545.

² *Arnold v. Brown*, 7 R. I. 196; 1 Washb. on Real Prop. 100; *Idle v. Cooke*, 2 Ld. Raym. 1152; *Hulburt v. Emerson*, 16 Mass. 241; *Hayward v. Howe*, 12 Gray, 49. But this will not always be the case. Whether an estate tail would under such circumstances be created by implication, depends upon the intention of the testator, as gathered from a consideration of the whole will. It will be explained in the chapter on Executory Devises (see *post*, sects. 538, 542, 243), when and under what circumstances a limitation over upon a failure of issue will convert the prior limitation into an estate tail. According to the intention of the testator, it will either convert it into an estate tail, or, if the prior limitation has sufficient words of limitation, the prior limitation will be construed to be a fee simple, liable to be defeated by the failure of issue, and the limitation over will take effect as an executory devise. Such was held to be the proper construction in the case of *Hill v. Hill*, 74 Pa. St. 173; s. c., 173; 15 Am. Rep. 545. See also *Allender's Lessee v. Sussan*, 33 Md. 11; 3 Am. Rep. 171.

³ 2 Bla. Com. 113, 114; 2 Prest. Est. 413, 414; 1 Washb. on Real Prop. 102, 103.

⁴ Thus, if the limitation is to the issue of the grantee begotten upon a woman, who is so near a relative as to render the marriage unlawful, the

is, or that they would have issue if married, the limitation will nevertheless be good. Such would be the case even though the man and woman are both married at the time to different parties; or they are so old that according to the ordinary laws of nature, they are incapable of procreating children. The law will consider it still possible for them to have issue, as long as they both live.¹ Another form of estate tail special is that to the heirs, male or female, of one's body. In this case the inheritance is confined to the male or female heirs to the exclusion of the others. And each taker must trace his descent through an unbroken line of that class of heirs. Thus if the limitation be to the heirs male of one's body, the grandson by a daughter could not take, nor if it be to heirs female, could the granddaughter by a son inherit. Very often the limitation is to the heirs male of the body, then to the heirs female, exhausting the first class of heirs, before the remainder to the latter takes effect. In such a conveyance, neither the grandson by the daughter, nor the granddaughter by the son, could inherit the estate, and it would revert for failure of issue,² if there were no technical heirs, male or female..

§ 49. **How estates tail may be barred.** — The statute *de donis* made the ordinary modes of conveyance incapable of barring entails, but in the course of time, the restraint upon alienation effected by this statute became so burdensome, practically excluding lands from the market as objects of barter or sale, that the courts at last by a fictitious contrivance, aided by remedial statutes, secured a means of alienation. It was in the nature of a fictitious suit, by which some persons laid claim to the land, and the tenant in tail either acknowledged the justice of his claim, or

limitation in tail would be void, and the donee would take only a life estate.

1 Washb. on Real Prop. 103.

¹ 2 Prest. Est. 395; 1 Washb. on Real Prop. 103.

² 2 Bla. Com. 114; 2 Prest. Est. 402, 403; 1 Washb. on Real Prop. 103, 104; Williams on Real Prop. 35; *Hulburt v. Emerson*, 16 Mass. 241.

allowed judgment by default to be entered up against him. There were two modes in use, viz.: fines, and common recoveries. They do not now exist, and have at no time existed in more than two or three of the States of this country. The subject therefore deserves no further consideration.¹ Since then, in England, it has not been possible to keep the estate entailed for any great length of time, at the most only during the minority of the tenants. As soon as the tenant became of age, he is able to bar it. This gave rise to what are known as marriage settlements, in which the lands were settled on the husband and wife for life,

¹ The following quotation from Mr. Washburn gives a lucid explanation of the common recovery, which was the most common and the most effectual mode of barring the entail: "This was a fictitious suit brought in the name of the person who was to purchase the estate, against the tenant in tail who, was willing to convey. The tenant, instead of resisting this claim himself, under the pretence that he had acquired his title of some third person, who had warranted it, vouched in, or by a process from the court called this third person, technically the *vouchee*, to come in and defend the title. The vouchee came in, as a part of the *dramatis personæ* of this judicial farce, and then, without saying a word, disappeared and was defaulted. It was a principle of the feudal law, adopted thence by the common law, that if a man conveyed lands with a warranty, and the grantee lost his estate by eviction by one having a better title, he should give his warrantee lands of equal value by way of recompense. And as it would be too barefaced to cut off the rights of the reversion as well as of the issue in tail by a judgment between the tenant and a stranger, it was gravely adjudged, (1) that the claimant should have the land as having the better title to it, and (2) that the tenant should have judgment against his vouchee to recover lands of equal value on the ground that he was warrantor, and thus, theoretically, nobody was harmed. If the issue in tail, reversioner or remainder-man, lost that specific estate, he was to have one of equal value through this judgment in favor of the tenant in tail; whereas, in fact, the vouchee was an irresponsible man, and it was never expected that he was anything more than a *dummy* in the game." 1 Washb. on Real Prop. 97, 98. Taltarum's Case, Year Book, 12 Edw. IV. 19, is the leading case on the subject; 2 Bla. Com. 116; 1 Spence Eq. Jur. 143; Williams on Real Prop. 45-48; Taylor v. Horde, 1 Burr. 84; Page v. Hayward, 2 Salk. 570. See the following American cases, in which fines and common recoveries are discussed and recognized, but declared to be abolished. Mc. Gregor v. Comstock, 17 N. Y. 162; Croxhall v. Sherard, 5 Wall. 268. In Pennsylvania they apparently exist still. Richman v. Lippincott, 29 N. J. L. 44; Lyle v. Richards, 7 S. & R. 322; Dewitt v. Eldred, 4 Watts & S. 421; Taylor v. Taylor, 63 Pa. St. 485. They never existed in Missouri. Moreau v. Detchemendy, 18 Mo. 527.

remainder to the first and other sons in tail, etc. In such a case the estate tail in remainder would be locked up, until the eldest son has reached his majority.¹

§ 50. **Merger of an estate tail.** — It is a general rule, which will receive constant illustration in the following pages, that where a less and a greater estate unite in one person, the former is merged and lost in the latter. But this is not always the case. A man may have an estate tail and the reversion in fee upon failure of issue, but the estate tail will remain intact, and cannot be barred except in the mode here indicated.²

§ 51. **Estate-tail after possibility of issue extinct.** — When the legal possibility of issue has ceased, it leaves to the tenant in tail a life estate of a peculiar character, which is denominated an estate tail *after possibility of issue extinct*. He is not liable to an action for waste by the reversioner, although he may be restrained by an equitable injunction from the commission of wilful and malicious waste. It is apparent that this can only happen in the case of an estate tail special. If the limitation be to the heirs of one's body generally, there is a legal possibility of issue, as long as the tenant is living.³

§ 52. **Estates tail in the United States.** — In the early colonial period, estates tail prevailed in this country very generally, and they could, in some of the States, be barred by fines and recoveries.⁴ But at the present time they have

¹ Williams on Real Prop. 50, 51; 1 Washb. on Real Prop. 99.

² Wiscot's Case, 2 Rep. 61; Roe v. Baldwere, 5 T. R. 110; Poole v. Morris, 29 Ga. 374; Altham's Case, 8 Rep. 154 b; Corbin v. Healy, 20 Pick. 515.

³ 1 Washb. on Real Prop. 110, 111; Williams on Real Prop. 54, 55; 2 Sharwood's Bla. Com. 125; Soc v. Audley, 1 Cox, 324; List v. Rodney, 2 Norris, 483; Co. Lit. 27b, 28 a.

⁴ Hawley v. Northampton, 8 Mass. 34; Perry v. Kline, 12 Cush. 120; Corbin v. Healey, 20 Pick. 515; Jewell v. Warner, 35 N. H. 170; Dennett v. Dennett, 40 N. H. 500; Jackson v. Van Zandt, 12 Johns. 149; McGregor v. Comstock, 17 N. Y. 162; Lyle v. Richards, 9 S. & R. 330; Den v. Schenck, 10

been abolished in most of the States. In some they are changed into fees simple, while in others they are divided into a life estate and remainder to issue, or easy modes of converting them into fees simple are provided.¹

N. J. L. 39; Partridge v. Dorsey, 3 Har. & J. 302; Croxhall v. Sherard, 5 Wall. 283; Dewitt v. Eldred, 4 Watts & S. 421; 4 Kent's Com. 14; Walker Am. Law, 299; 1 Washb. on Real Prop. 111.

¹ In Alabama, California, Connecticut, Florida, Georgia, Kentucky, Maryland, Michigan, Minnesota, Mississippi, North Carolina, Tennessee, Texas, Wisconsin, Virginia, and West Virginia, estates tail are converted into fees simple. In Arkansas, Illinois, Kansas, Missouri, New Jersey, and Vermont, the tenant in tail takes a life estate and the heirs of his body the remainder in fee *per formam doni*. In Indiana and New York, the tenant takes a fee simple, if there is no limitation in remainder, after the estate tail, and a life estate, when there is such a limitation. And while in Delaware, Maine, Massachusetts, Pennsylvania and Rhode Island, estates tail are not expressly abolished, and presumably if not aliened they would descend to the special heirs, and revert to the grantor upon failure of such heirs, it is now provided by statute in those States that a conveyance in common form will pass a fee simple estate, and bar the entail. 1 Washb. on Real Prop. 112, note; Williams on Real Prop. 35, Rawle's note. In South Carolina, the statute *de donis* has never been recognized as a part of the common law, and fees conditional still exist there. 3 S. C. Stats. at Large 341.

CHAPTER V.

. ESTATES FOR LIFE.

- SECTION 60.** Definition and classes of life estates.
- 61. Peculiarities of an estate *per auter vie*.
 - 62. Words of limitation in estates for life.
 - 63. The merger of life estate in a greater.
 - 64. Alienation by tenant for life.
 - 65. Tenure between tenant for life and reversioner.
 - 66. Apportionment between life tenant and reversioner of incumbrances.
 - 67. Same — Of rent.
 - 68. Claim for improvements.
 - 69. Estovers.
 - 70. Emblements, what they are.
 - 71. Same — Who may claim them.
 - 72. Definition and history of waste.
 - 73. What acts constitute waste.
 - 74. Waste in respect to trees.
 - 75. Continued — In respect to minerals and other deposits.
 - 76. Continued — Management and culture of land.
 - 77. Continued — In respect to buildings.
 - 78. Continued — Acts of strangers.
 - 79. Continued — Destruction of buildings by fire.
 - 80. Exemption from liability.
 - 81. Remedies for waste.
 - 82. Property in timber unlawfully cut.

§ 60. **Definition and classes of life estates.**—An estate for life is strictly one whose duration is limited by the life or lives of certain persons ; it may be the life of the tenant, the life of another, or the joint lives of the tenant and others. But the term has been generally extended so as to include all freeholds not of inheritance. It will, therefore, embrace an estate for an uncertain period, which may continue during a life or lives. Such would be a grant to a woman during widowhood. If she marries, her estate would terminate ; but it may endure as

long as she lives.¹ And it is of no consequence how uncertain the duration of the estate may be, or how likely it will terminate in a given number of years; if it can, and may, continue during a life, it is considered a freehold estate for life. Such is a grant to one, until he can, out of the rents and profits, pay the debts of the grantor. But if the conveyance be a devise to executors, until the devisor's debts are paid, they would take only a chattel interest.² An estate for one's own life is considered by the law to be the highest and best estate for life that one can have. Consequently the courts, in construing a doubtful grant for life, would hold it to be for the life of the tenant, rather than for the life of the grantor.³ An estate for the life of another is called in the Norman-French, an estate *per auter vie*, and the one whose life limits its duration is called the *cestui que vie*.⁴ In the present chapter we shall speak only of estates for life in general and of those incidents which pertain to the estates for life, which are created by the act of the parties, or in other words, of conventional life estates. There are other classes of life estates, which come into being by operation of law, as in the case of dower and curtesy; these will be treated in a separate chapter.⁵

§ 61. **Peculiarities of an estate per auter vie.**—An estate for the life of another, as, for example, an estate for the life of the grantor, is a freehold, but is not an estate of inheritance. Perhaps during the earlier existence of the feudal system, it was not considered as strictly a freehold interest; but it is now, and has long been, included in that class of estates. The estate terminates with

¹ Co. Lit. 42 a; Hurd v. Cushing, 7 Pick. 179; Jackson v. Myers, 3 Johns. 388; Roseboom v. VanVechten, 5 Denio, 414; Hatfield v. Sneden, 54 N. Y. 285; Clark v. Owens, 18 N. Y. 434; Hewlins v. Shippam, 5 B. & C. 221; 2 Bla. Com. 121

² Co. Lit. 42 a; 1 Washb. on Real Prop. 116.

³ Co. Lit. 42 a; 2 Bla. Com. 121; 1 Washb. on Real Prop. 115.

⁴ Co. Lit. 41 b; 2 Bla. Com. 120.

⁵ See *post*, ch. VI., sects. 90, 164.

the death of the *cestui que vie*, and does not expire with the death of the tenant. If, therefore, the tenant dies during the life of the *cestui que vie*, the estate continues and must vest in some one. If he has conveyed it away, his grantee will hold it, unaffected by his death. But if he dies in possession, a question of some difficulty arises. At common law, it could not descend to his heirs, for the law of descent applies only to estates of inheritance; and this is not such an estate. It could not descend to the executor or administrator, for they could take only chattel interests, and this was a freehold. It was also not devisable, for it was a freehold interest. At common law it was permitted for any one who first took possession to hold it, and he was called the *general occupant*.¹ This right of general occupancy could only be exercised where there were no persons designated in the grant who could take as *special occupants*. If the grant was to A. and his heirs during the life of B., the heirs would take as special occupants, to the exclusion of the general occupant.² But these special occupants had not the interest of purchasers during the life of the tenant. They only took what was left undisposed of, and could not prevent its alienation by the tenant. On the other hand, the tenant could not bar them by a devise of the estate.³ This peculiarity of the common law has since been done away with by statute in England, and in almost every State in this country. In some, estates *per auter vie* are made to descend to heirs in common with

¹ Co. Lit. 41 b; 2 Bla. Com. 259.

² 2 Bla. Com. 259, 260; *Atkinson v. Baker*, 4 T. R. 229. A tenant at will of the tenant *per auter vie*, in possession at the death of the latter, will, as against the general occupant, have a superior claim as one species of special occupant, though he would have to yield possession to the special occupant, who was also heir of the tenant. Co. Lit. 41 b, note 232. And in like manner, the executor or administrator might have taken the estate as special occupant, if the grant had been to the tenant and his executors and administrators, instead of to him and his heirs. See authorities, *supra*.

³ *Doe v. Robinson*, 8 B. & C. 213; *Doe v. Laxton*, 6 T. R. 289; *Allen v. Allen*, 2 Dru. & War. 307; 1 Washb. on Real Prop. 121.

other real estate; while in others it is treated as a chattel interest, and constitutes assets in the hands of the personal representatives.¹

§ 62. **Words of limitation in estates for life.** — There are no words of limitation required at common law. A grant of an estate was construed to be for the life of the grantee, where there was no express limitation.² But in those States where now by statute all grants and devises are made to convey a fee simple estate, unless a less estate is expressly limited, it would be necessary to limit the estate for the life of the grantee in express words.³ And in devises, a life estate is often raised by implication. Thus where A. devised his lands to his heirs after the death of B., it was held that B. took an estate for life by necessary implication, since no one could take the estate except the heir, and he was postponed by the will until B.'s death. But if the devise had been to a stranger after the death of B., the heirs would have taken by descent during the life of B., instead of the latter.⁴

§ 63. **The merger of life estate in a greater.** — If a life estate is conveyed to one having a reversion or any other greater estate, or the tenant acquires the reversion, the life estate is merged in the latter.⁵ So would an estate for the life of another merge in an estate for one's own

¹ In Missouri, Arkansas, Rhode Island, North Carolina, Massachusetts, and some others, it is real estate; while in New York, New Jersey, Pennsylvania, Indiana, Kentucky, Minnesota, Maryland, Michigan, Wisconsin, Texas, it is personal property. In all the States it can now be disposed of by will. In Maryland, the right of special occupancy is still recognized, so that if the estate *per auter vie* is expressly limited to the heirs, the heirs will take as special occupants. In the other States, the limitation does not give them a superior title, if the statute makes the estate personal property. See 1 Washb. on Real Prop. 121; Williams on Real Prop. 21, Rawle's note.

² Co. Lit. 42 a; 5 Bla. Com. 121.

³ See *ante*, sect. 37.

⁴ 1 Washb. on Real Prop. 116, 117,

⁵ 2 Bla. Com. 177; Co. Lit. 41 b.

life.¹ But if the tenant for life conveys to the reversioner an estate for the life of the latter, a possible reversionary interest being left in the tenant, there will be no merger, and the tenant would take the estate again, if the reversioner should die during his lifetime.²

§ 64. **Alienation by tenant for life.** — Unless there is a condition in restraint of alienation, the tenant for life may convey his estate as freely as the tenant in fee. He may alien his entire interest, which would become, in his grantee, an estate *per auter vie*. Or he may grant any smaller estate, and may carve up his estate into any number of smaller estates, as long as they do not together exceed his life estate.³ If the life tenant attempted to convey, by a common-law feoffment, a greater estate than he had, it worked a forfeiture of his estate; his grantee received nothing, and the estate in remainder or in reversion vested in possession. This rule follows as a consequence from the feudal notion that the wrongful feoffment of the life tenant was a renunciation of the feudal tenure between him and the lord, an act of disseisin, which divested the remainder-man or reversioner, of his seisin by its livery to the grantee.⁴ And this rule applies to this day, wherever it has not been changed by statute. But if he attempts the conveyance of a greater estate by any other mode of conveyance, such as a grant, lease, and release, or bargain and sale, which operate under special statutes or under the Statutes of Uses, it will only have the effect of conveying what interest he has, and no forfeiture results therefrom.⁵

¹ 1 Washb. on Real Prop. 117; 1 Spence Eq. Jur. 144; Williams on Real Prop. 22.

² 1 Washb. on Real Prop. 117, 118; Co. Lit. 42, 218 b.

³ 1 Cruise Dig. 103; Stewart v. Clark, 13 Metc. 79; Jackson v. Van Hoesen, 4 Cow. 325; Williams on Real Prop. 26.

⁴ 2 Bla. Com. 274, 275; 1 Cruise Dig. 108; 1 Washb. on Real Prop. 118, 119; Jackson v. Mancius, 2 Wend. 335; Stump v. Findlay, 2 Rawle, 168; Matthews v. Ward's Lessee, 10 Gill & J. 449; Redfern v. Middleton, 1 Rice, 459; Faber v. Police, 10 S. C. 376. See *post*, sects. 422, 770.

⁵ 1 Washb. on Real Prop. 119. See *post*, sect. 422.

These deeds do not operate by transmutation of possession, and therefore do not divest the tenant in remainder or reversion of his seisin. The nature and effect of these various deeds will be more particularly considered in subsequent pages.¹

§ 65. **Tenure between tenant for life and reversioner.**—The relation of tenure so far exists between the life tenant and his reversioner, as that the possession of the former is never deemed to be adverse to the latter. That is, during the existence of the life estate he cannot disseise his reversioner by any adverse claim of title. Nor will the disseisin of the life tenant by a stranger affect the rights of the reversioner during the life of the former. He may recover possession of the disseisor at any time after the death of the life tenant within the statutory period of limitation. The statute only runs from the death of the tenant.² And where the life tenant has granted the fee, his grantee becomes a trespasser from his death, and may be ousted by the reversioner, it matters not how long he may have been in possession during the life of the tenant for life.³ But the common-law real actions, when brought against the life tenant for recovery of the land under a claim of title adverse to both reversioner and life tenant, barred the claims of the reversioner as well as the life tenant, even though the former was not made a party to the suit. These real actions could only be brought against the tenant in possession, who was called the tenant of the *præcipe*. The life tenant was, therefore, under obligation to the reversioner to defend the title in such actions; but he could relieve him-

¹ See *post*, sects. 774, 779.

² *Varney v. Stephens*, 22 Me. 334; *Austin v. Stevens*, 24 Me. 526; *Foster v. Marshall*, 22 N. H. 491; *Jackson v. Schoonmaker*, 4 Johns. 390; *Jackson v. Mancius*, 2 Wend. 357; *Grout v. Townshend*, 2 Hill, 554; *McCorry v. King's heirs*, 3 Humph. 367; *Guion v. Anderson*, 8 *Ib.* 325; *Archer v. Jones*, 26 Miss. 583.

³ *Williams v. Caston* 1 Strobb. 130. See *Moore v. Luce*, 29 Pa. St. 263.

self of the duty by calling in the reversioner to assist in the defence. This was called "praying in aid." He could, however, defend without calling in such assistance, and the judgment would be equally conclusive against the reversioner.¹ These actions have now been abolished in England and in this country, and since the principle did not prevail in any other forms of actions, a judgment for recovery of land only affects the parties to the suit.²

§ 66. **Apportionment, between life tenant and reversioner of incumbrances.**—The life tenant is bound to pay all the accruing interest on existing incumbrances upon the estate; but he is not compelled, as against the reversioner, to pay off the principal of the debt. The payment of the principal falls upon the reversioner.³ If the life tenant pays off the entire debt, he becomes a creditor of the reversioner for the share of the latter, and *vice versa*. The payment is, in such a case, apportioned between them. The tenant would have to pay such a sum, as would equal the present value of the amount of interest he would probably have paid during his life, if the mortgage had continued so long in existence, estimating his probable length of life by the ordinary tables of mortality. The balance, after deducting this sum, would be the amount due from the reversioner.⁴ Formerly it was arbitrarily apportioned between

¹ 1 Prest. Est. 207, 208; 1 Washb. on Real Prop. 73, 74, 122.

² 1 Spence Eq. Jur. 225; 1 Washb. on Real Prop. 122, 123.

³ 1 Story Eq., sect. 486; 4 Kent's Com. 76; Kensington v. Bouverie, 31 Eng. Law & Eq. 345; Mosely v. Marshall, 25 Barb. 42; Doane v. Doane, 46 Vt. 496; Warley v. Warley, 1 Bailey Eq. 397. But this is not a personal claim against the life tenant, which the incumbrancer can enforce. He is only obliged to pay the interest, if he desires to save the estate from forfeiture. Morley v. Sanders, L. R. 8 Eq. 594; Kensington v. Bouverie, *supra*; Doane v. Doane, *supra*; Plympton v. Boston Dispens., 106 Mass. 544. It is different in respect to the liability of the tenant for life for accruing taxes. These he is obliged to pay; if he does not, and purchases the tax-title given for default of taxes, he cannot set it up in opposition to the reversioner. Cairns v. Chabert, 3 Edw. Ch. 312; Fleet v. Dorland, 11 How. Pr. 489; Patrick v. Sherwood, 4 Blatchf. 112.

⁴ Saville v. Saville, 2 Atk. 403; Eastabrook v. Hapgood, 10 Mass. 315,

them, the tenant paying one-third, and the reversioner two-thirds. But this rule has now generally been superseded by the rule of apportionment, just explained.¹

§ 67. **Same — Of Rent.** — It was the common-law rule that, if a tenant for years was ousted by one holding a better title before the expiration of his lease, or between the days of payment of his rent, he was not liable for any rent, since the rent could not be apportioned to the time during which he enjoyed the possession under the lease. So, if a tenant for life grants a lease for years, the rent to be paid on a fixed day, and he dies before the rent becomes due, his personal representative would have no right of action for rent accruing between the last pay-day and the day of his death.² And if the lease was given by virtue of, and under, a power

note; *Foster v. Hilliard*, 1 Story, 87; *Newton v. Cook*, 4 Gray, 46; *Gibson v. Crehore*, 5 Pick. 146; *Bell v. Mayor of New York*, 10 Paige Ch. 71; *House v. House*, *Id.* 158; *Swain v. Perine*, 5 Johns. Ch. 482; *Cogswell v. Cogswell*, 2 Edw. Ch. 231; *Dorsey v. Smith*, 7 Har. & J. 367; *Snyder v. Snyder*, 6 Mich. 470; *Abercrombie v. Riddle*, 3 Md. Ch. 324. The tables usually employed are Wigglesworth's and the Carlisle tables, the latter being considered the more accurate. When it is stated in the text, that the reversioner is obliged to pay the balance remaining, after deducting the sum to be liquidated by the tenant for life, it is not meant that he is under a personal obligation to pay it. He may refuse, and allow the tenant for life to enforce the incumbrance against him. See *post*, sect. 192. The tenure existing between them only prevents the tenant from holding the incumbrance, so acquired, adversely to the reversioner, if he should desire to obtain the benefit of the purchase by contributing his share towards the expenses. *Foster v. Hilliard*, 1 Story, 77; *Davies v. Myers*, 13 B. Mon. 511.

¹ 1 Story Eq. 487. See *Jones v. Sherrard*, 2 Dev. & B. Ch. 179. But it is still the rule of law in South Carolina, that the tenant is to pay one-third, and the reversioner two-thirds. *Wright v. Jennings*, 1 Bailey, 277. In *Garland v. Crow*, 2 Bailey, 24, the court say: "In contemplation of law, an estate for life is equal to seven years' purchase of the fee. To estimate the present value of an estate for life, interest must be computed on the value of the whole property for seven years; and, perhaps, interest on the several sums of annual interest from the present time to the periods at which they respectively fall due, ought to be abated." Following this rule, and calculating the interest at seven per cent, it would be a little more than thirty-five per cent of the value of the estate. See *post*, sect. 146.

² 2 Bla. Com. 124; 1 Washb. on Real Prop. 126; *Fitchburg Cotton Co. v. Melvin*, 15 Miss. 268; *Perry v. Aldrich*, 13 N. H. 343. See *post*, sect. 192.

so that it did not terminate with the death of the life tenant, the entire rent would be payable to the reversioner, and the personal representatives of the life tenant would get nothing. This rule was so strictly enforced that in one case the rent lacked one hour of falling due, when the life tenant died, and the reversioner took the rent.¹ But this injustice of the common law has now been remedied by statutory changes, so that now generally, the rent is apportioned between the life tenant and reversioner, giving each his *pro rata* share according to the time of enjoyment of the lease before, and after, the tenant's death. And the personal representatives of the life tenant may sue the tenant for years for the rent which may be apportioned to him.²

§ 68. **Claim for Improvements.**—The tenant for life has no claim for any improvements which he may have made upon the premises. He is bound to keep the premises in repair, but is under no legal obligation to undertake any improvements. If he does, it is a voluntary act of his own, which gives rise to no claim against the reversion for the payment of his share of the expenses.³ On the other hand, the tenant for life is obliged to pay all the taxes which may be assessed upon the land; and, if he fails to do

¹ *Strafford v. Wentworth*, 1 P. Wms. 180; *Rockingham v. Penrice*, *Id.* 178; 1 Washb. on Real Prop. 127; *post*, sect. 192. In England by the Settled Estates Act, 1877, every tenant for life, unless expressly declared to the contrary in the deed to him, may demise the premises for twenty-one years, which shall not determine at the death of the tenant, provided the lease takes effect in possession within one year after its execution, and the rent reserved is made an incident of the reversion. Williams on Real Prop. (5th ed.) 26, 27. But in the United States, as a general rule, there are no such statutes, and an express power to make leases is necessary, in order to have the term continue after the expiration of the life estate.

² Williams on Real Prop. 27; 1 Washb. on Real Prop. 127; *Price v. Pickett*, 21 Ala. 741; 3 Kent's Com. 469, 470.

³ 1 Washb. on Real Prop. 123; *Parsons v. Winslow*, 16 Mass. 361; *Sohier v. Eldridge*, 103 Mass. 351; *Corbet v. Laurens*, 5 Rich. Eq. 301.

so, a receiver may be appointed to take charge of the estate, and pay the taxes out of accruing rents and profits.¹

§ 69. **Estovers.**—This word signifies the timber that a tenant is allowed to cut upon the land for use upon the premises, and for keeping them in repair. They were divided by the common law into three kinds, viz.: *house-bote*, *plough-bote*, and *hay-bote*. House-bote included the wood necessary for the repair of the buildings and for the purpose of fuel. Plough-bote covered such as was needed for the manufacture or repair of all instruments of husbandry; while hay-bote was what was used in the erection and maintenance of fences and hedges. The tenant, whether he is one for life, or for years, has this right as a compensation for the duty of keeping the premises in repair and so does his assignee.² But the right is limited to only what is reasonably necessary for present use. If the tenant exceeds this amount, and cuts timber, for the purpose of sale, or even cuts a reasonable amount of wood, which is not suitable for estover, and exchanges it for what is, he is deemed guilty of waste, and is liable to the reversioner for damages.³ Nor can he use them on any other place but the one from which they are taken. Thus a widow, who had two places set out to her as dower out of two separate estates, she was not allowed to cut wood on one place for use on the other, even though the latter has no woodland. But if she obtained both parcels of land from the same estate, it would not be waste

¹ *Varney v. Stevens*, 22 Me. 331; *Cairns v. Chabert*, 3 Edw. Ch. 312; *Prettyman v. Walston*, 34 Ill. 192.

² 1 Washb. on Real Prop. 128, 129; Co. Lit. 416; 2 Bla. Com. 35.

³ 1 Washb. on Real Prop. 129; 2 Bla. Com. 122; *Webster v. Webster*, 33 N. H. 21; *Smith v. Jewett*, 40 N. H. 532; *Johnson v. Johnson*, 18 N. H. 597; *Hubbard v. Shaw*, 12 Allen, 122; *Simmons v. Norton*, 7 Bing. 640; *Richardson v. York*, 14 Me. 221; *White v. Cutler*, 17 Pick. 248; *Padelford v. Padelford*, 7 Pick. 152; *Sarles v. Sarles*, 3 Sandf. Ch. 601; *Livingston v. Reynolds*, 2 Hill, 157; *Gardiner v. Dering*, 1 Paige Ch. 573; *Roberts v. Whiting*, 16 Mass. 186; *Doe v. Wilson*, 11 East, 56.

for her to use wood on one, which was cut on the other.¹ In England the rule in regard to the right of estovers is much stricter than it is in this country, on account of the difference in the economic necessities of the two countries. In this country woodland is very abundant, and what would be waste in England, would not necessarily be so here. The rule as applied in this country is that the life tenant may cut as much timber as he may need for use upon the premises, provided it does not materially injure the value of the reversion. Nothing but actual injury would be considered waste, and there can be no general rules laid down in detail which would be applicable to each case which may arise. The determination of the question depends upon the circumstances of each case.²

§ 70. **Emblements — What they are.** — Emblements are the profits which the tenant of an estate is entitled to receive out of the crops which he has planted, and which have not been harvested, when his estate terminates. Under the term emblements are only included, as a rule, such products of the soil as are of annual growth and cultivation. Such would be the different cereals and vegetables, wheat, corn, beans, hay, flax, potatoes, melons, etc. Hops are also included, although they are not planted annually.³ But they do not include the grasses, which are only planted perennially, nor the fruit of trees, because in these cases, the tenant cannot expect to reap such a benefit in one year, and he is aware of that fact when he plants them.⁴ This

¹ *Cook v. Cook*, 11 Gray, 123; *Padelford v. Padelford*, 7 Pick. 152; *Phillips v. Allen*, 7 Allen, 117; *Dalton v. Dalton*, 7 Ired. Eq. 197; *Owen v. Hyde*, 6 Yerg. 334; *Webster v. Webster*, 33 N. H. 26.

² *Padelford v. Padelford*, 7 Pick. 152; *Pyncheon v. Stearns*, 11 Metc. 304; *Webster v. Webster*, 33 N. H. 26; *Jackson v. Brownson*, 7 Johns. 227; *Morehouse v. Cotheal*, 2 N. J. L. 521; *McCullough v. Irvine*, 13 Pa. St. 448; *Crockett v. Crockett*, 2 Ohio St. 180.

³ *Co. Lit.* 55 a. b. note 364; 2 Bla. Com. 122; *Stewart v. Doughty*, 9 Johns. 108; 1 Washb. on Real Prop. 132, 133.

⁴ 1 Washb. on Real Prop. 133; *Reiff v. Reiff*, 64 Pa. St. 134; 2 Bla. Com. 123; *Evans v. Inglehart*, 6 Gill & J. 188.

does not, of course, refer to the right which nurserymen have to trees and shrubs, which they plant for the purpose of sale. As has been shown, in such cases the plants are fixtures, which he is entitled to remove, tree and plant, as well as the fruit thereof.¹ And to entitle one to the crops, they must be planted by him. If the crop has been planted by another, the tenant will not be entitled to them, however much care he may have bestowed upon them.² As an incident to the right of emblements, the tenant or his representatives have a right of entry upon the land, after the termination of the tenancy, for the purpose of attending to the crop while growing, and for harvesting it when ripe. The right of ingress and egress, however, is limited to what is necessary for these purposes.³ But it has been asserted and claimed by some authorities, that the tenant would be liable for rent for such occupation of the land.⁴ It does not, however, seem to be the general custom to pay it or demand it. The common law as to what constitute emblements, and the extent of the right, has been very accurately and definitely settled. But it will be found that local usages and customs will cause the local law to vary somewhat from the common law. Still the more important principles are found to be uniformly applied throughout the country.⁵

¹ Taylor's L. & T. 81; 1 Washb. on Real Prop. 11, 133; *Penton v. Robart* 2 East, 88; *Miller v. Baker*, 1 Metc. 27; *Whitmarsh v. Walker*, *Id.* 313; *Wyndham v. Way*, 4 Taunt. 316.

² *Grantham v. Hawley*, Hob. 132; *Stewart v. Doughty*, 9 Johns. 108; *Gee v. Young*, 1 Hayw. 17; *Thompson v. Thompson*, 6 Munf. 514; *Price v. Pickett*, 21 Ala. 741.

³ 1 Washb. on Real Prop. 136, 137. *Forsythe v. Price*, 8 Watts, 282; *Humphries v. Humphries*, 3 Ired. 362.

⁴ 1 Washb. on Real Prop. 137.

⁵ 1 Washb. on Real Prop. 137. In several of the States, the tenant for years under special circumstances is by local custom allowed emblements, although generally, as will be explained in sect. 71, tenants for years have no right to emblements. See *Van Doren v. Everitt*, 5 N. J. L. 460; *Howell v. Schenck*, 24 N. J. L. 89; *Templeman v. Biddle*, 1 Harr. 522; *Dorsey v. Eagle*, 7 Gill & J. 331; *Foster v. Robinson*, 6 Ohio St. 95.

§ 71. **Same — Who may claim them.** — In order that a tenant may claim emblements, he must show that his estate was one of uncertain duration. This would, of course, include the representatives of all tenants for life, whether they are conventional or legal life estates, and because they constitute the larger class of those who are entitled to them, the subject has been discussed in this connection.¹ Tenants at will also have the right,² but not tenants for years or at sufferance.³ And as an outcome of the law of emblements the executors of the tenants in fee are entitled to the crops if they are ripe for harvest, in preference to the heirs.⁴ But if the estate is terminated through the fault of the tenant, as when he abandons the premises, or voluntarily destroys his estate, by failure to perform a condition, or where the party is in wrongful possession, without color of title, he is not entitled to emblements.⁵ Thus, a widow has no claim to emblements, where she terminates her tenancy during widowhood by marriage;⁶ nor has a mortgagor, where the mortgage is foreclosed by the mortgagee, since he could have avoided its destruction by payment of the mortgage. But if the purchaser under a foreclosure sale,

¹ Taylor's L. & T. 81; *Chelsey v. Welch*, 37 Me. 106; *Kittredge v. Woods*, 3 N. H. 503; *Whitmarsh v. Cutting*, 10 Johns. 360; *Graves v. Weld*, 5 B. & Ad. 105; *Debow v. Colfax*, 10 N. J. L. 128; *Harris v. Carson*, 7 Leigh, 632; *Spencer v. Lewis*, 1 Houst. 223; *Haslett v. Glesin*, 7 Har. & J. 17.

² *Davis v. Thompson*, 13 Me. 209; *Sheeburne v. Jones*, 20 Me. 70; *Chandler v. Thurston*, 10 Pick. 205; *Davis v. Brocklebank*, 9 N. H. 73; *Stewart v. Doughty*, 9 Johns. 108; *Harris v. Frink*, 49 N. Y. 24.

³ *Doe v. Turner* 7 M. & W. 226. As to tenants for years see cases cited in note 5, p. 47.

⁴ *Penhallow v. Dwight*, 7 Mass. 34; *Kingsley v. Holbrook*, 45 N. H. 319; *Howe v. Batchelder*, 49 N. H. 208; *Pattison's Appeal*, 61 Pa. St. 29. But they will pass with the land under a devise. *Bradner v. Faulkner*, 34 N. Y. 349. In Mississippi a contrary rule is maintained, and the crops pass to the heir upon the death of the tenant in fee. *McCormick v. McCormick*, 40 Miss. 763. See also on the general subject, 2 Redf. on Wills, 143.

⁵ 2 Bla. Com. 123; *Cflesley v. Welch*, 37 Me. 106; *Chandler v. Thurston*, 10 Pick. 210; *Whitmarsh v. Cutting*, 10 Johns. 360; *Rowell v. Klein*, 44 Ind. 290; *Richard v. Liford*, 11 Rep. 51; *McLean v. Bovee*, 24 Wis. 295.

⁶ *Debow v. Colfax*, 10 N. J. L. 128; *Hawkins v. Skegg*, 10 Humph. 31.

permits the mortgagor, or one claiming under him, to retain possession for any length of time, and plant crops, as a tenant at sufferance he would have a right to the emblements.¹ The right to emblements is not only enjoyed by the parties above enumerated, but also by their assignees, and sublessees, unless the tenant is restricted from alienating the land. And very often sublessees, and assignees would be entitled to emblements, when the original parties would not. Thus, if a widow, having an estate during widowhood, leases the premises, and then marries, her tenant would be entitled to emblements, while she would not have been, if she had been in possession.¹

§ 72. **Definition and history of waste.** — Every tenant of a particular estate is prohibited from doing anything with the land which would constitute a waste in the legal acceptation of the term. The subject applies, therefore, to all tenants, whether for life or for years, or at sufferance. In early times this disability was attached by law only to estates of dower and curtesy, it being supposed that, since they were created by the act of the law, the law should in all cases provide for the due protection of the inheritance. But in the case of conventional estates less than a fee, if the grantor did not expressly provide such a protection, it was his own fault, and he was left without a remedy. Subsequently, by the statute of Marlbridge, the disability of committing waste was made an ordinary and general incident

¹ *Doe v. Mace*, 7 Black, 2; *Tobey v. Reed*, 9 Conn. 216; *Cooper v. Davis*, 15 Conn. 556; *McCall v. Lenox*, 9 Serg. & R. 302; *Jones v. Thomas*, 8 Blackf. 428; *Allen v. Carpenter*, 15 Mich. 38. And the same rule applies to a mortgagor's tenant, who holds subject to the mortgage. *Mayo v. Fletcher*, 14 Pick. 525; *Lynde v. Rowe*, 12 Allen, 101; *contra*, *Lane v. King*, 8 Wend. 584. But where the crops are already harvested, when the mortgage is foreclosed, the tenant is entitled to them; they do not pass to the purchaser under the mortgage. *Johnson v. Camp*, 51 Ill. 220.

² 2 Bla. Com. 124; *Bulwer v. Bulwer*, 2 B. & Ald. 470; *Davis v. Eyton*, 7 Bing. 154; *Evans v. Briscoe*, 4 Har. & J. 139; *contra*, *Oland's Case*, 5 Rep. 116; *Debow v. Colfax*, 10 N. J. L. 128; *Bittinger v. Baker*, 29 Pa. St. 70. See also *contra*, note 1, *supra*, in reference to mortgagor's tenant.

to all kinds of estates for life and for years. And the statute of Gloucester imposed upon the guilty party the penalty of treble damages, together with the forfeiture of his estate.¹ Waste is any unlawful act or omission of duty, which results in permanent injury to the inheritance. It may consist in either diminishing its value, in increasing its burdens, or destroying and changing the evidences of title to the inheritance.² Waste may therefore be voluntary, as by an act of commission, and involuntary, by an act of omission.¹

§ 73. **What acts constitute waste — General rule.** — Whether a particular act constitutes waste is a question of fact for the jury to determine. If it does damage to the reversioner, and is not one of the ordinary uses, to which the land is put, it is waste. And the same act might be waste in one part of the country, while in another it is a legitimate use of the land. The usages and customs of each community enter very largely into the settlement of this question.⁴

§ 74. **Waste — In respect to trees.** — The tenant has no right to cut down any trees, or to injure them in any way, beyond the amount he is entitled to as estovers. And at

¹ 1 Washb. on Real Prop. 139, 140.

² 2 Bla. Com. 281; *Huntley v. Russell*, 13 Q. B. 588; *Doe v. Burlington*, 5 B. & Ad. 517; *Jones v. Chappell*, L. R. 20 Eq. 539; *McGregor v. Brown*, 10 N. Y. 117; *Proffit v. Henderson*, 29 Mo. 327. And in some cases the law raises a conclusive presumption that the act complained of is an injury to the inheritance, and therefore constitutes waste. *McGregor v. Brown*, *supra*; *Agate v. Lowenbein*, 57 N. Y. 604. See *post*, sects. 74, 77.

³ 2 Bla. Com. 281; 1 Washb. on Real Prop. 140. Thus, to alter a building, so as to change the manner of using it, is voluntary waste. To let it fall into decay, is permissive or involuntary waste. See *post*, sect. 77.

⁴ See *Drown v. Smith*, 52 Me. 143; *Keeler v. Eastman*, 11 Vt. 393; *Jackson v. Tibbits*, 3 Wend. 341; *Pyncheon v. Stearns*, 11 Metc. 304; *Lynon's Appeal*, 31 Pa. St. 46; *Webster v. Webster*, 33 N. H. 25; *Morehouse v. Cothens*, 22 N. J. L. 521; *Jackson v. Brownson*, 7 Johns. 227; *Sarles, v. Sarles*, 3 Sandf. Ch. 601; *Adams v. Brereton*, 3 Har. & J. 124; *Davis v. Gilliam*, 5 Ired. Eq. 311; *Crockett v. Crockett*, 2 Ohio St. 180.

common law certain trees, which were used for timber, could not be cut for any purpose.¹ But in this country the question would depend upon whether the cutting of a particular tree would be consonant with good husbandry, in its relation to the inheritance and the surrounding circumstances.² In the case of wild and uncultivated lands, the tenant would have the right to clear the land of the trees, whatever they may be, if such clearing was necessary for the purpose of cultivating it.³ And the timber cut by

¹ 2 Bla. Com. 281; 1 Washb. on Real Prop. 141; *Honywood v. Honnywood*, L. R. 18 Eq. 306. Mr. Washburn mentions oak, ash and elm, as being timber trees in all parts of England, while others constitute timber in some sections, and not in other sections, according to local usages and customs. p. 141, *supra*. Timber trees are those which are used for building and repairing houses. *Chandos v. Talbot*, 2 P. Wms. 606; *Alexander v. Fisher*, 7 Ala. 514. The only purpose for which the tenant may cut timber is for the repair of the buildings on the land, which he is under obligation to keep in repair. 22 Vin. Abr. 453; *Doe v. Wilson*, 11 East, 56. And he cannot cut timber unsuitable for repair, to sell and procure other timber which is suitable. See *ante*, sect. 69.

² *Keeler v. Eastman*, 11 Vt. 293; *Chase v. Hazleton*, 7 N. H. 171; *Hickman v. Irvine*, 3 Dana, 121; *Sarles v. Sarles*, 3 Sandf. Ch. 601; *Givens v. McCalmont*, 4 Watts, 460; *Shine v. Wilcox*, 1 Dev. & B. Eq. 631; *Smith v. Poyas*, 2 DeS. 65; *Crockett v. Crockett*, 2 Ohio St. 180; *Owen v. Hyde*, 6 Yerg. 334; *Alexander v. Fisher*, 7 Ala. 514. But it is an almost universal rule, that shade and ornamental trees cannot be cut down by the tenant. *Honywood v. Honnywood*, L. R. 18 Eq. 306; *Hawley v. Wolverton*, 5 Paige, 522; *Dunn v. Bryan*, 7 Ired. Eq. 143; *Marker v. Marker*, 9 Hare, 1. So also is it waste to cut young trees. *Dunn v. Bryan*, *supra*. In conformity with the rule enunciated in the text, it has been held in Massachusetts that the cutting of oak for firewood is not waste according to the common usage and custom in that State. *Padelford v. Padelford*, 7 Pick. 162.

³ *Drown v. Smith*, 52 Me. 141; *Keeler v. Eastman*, 11 Vt. 293; *McGregor v. Brown*, 10 N. Y. 118; *Jackson v. Brownson*, 7 Johns. 227; *McCullough v. Irvine*, 13 Pa. St. 438; *Harder v. Harder*, 20 Barb. 414; *Morehouse v. Cotheal*, 22 N. J. L. 521; *Hastings v. Crunckleton*, 3 Yeates, 261; *Davis v. Gilliam*, 5 Ired. Eq. 311; *Woodward v. Gates*, 38 Ga. 205; *Adams v. Brereton*, 3 Har. & J. 124; *Crockett v. Crockett*, 2 Ohio St. 180; *Proffitt v. Henderson*, 29 Mo. 327. And the same rule is now applied to a dowress, although formerly under the old rule, that the tenant of a particular estate could under no circumstances change woodland into arable land, the widow was held not to have dower in wild lands. 4 Kent's Com. 76; *Ballantine v. Poyner*, 2 Hayw. 110; *Parkins v. Cox*, *ib.* 339; *Hastings v. Crunckleton*, 3 Yeates, 261; *Owen v. Hyde*, 6 Yerg. 334; *Findlay v. Smith*, 6 Munf. 134; *Alexander v. Fisher*, 7

the tenant in clearing belongs to him, which he may sell for his own profit.¹ But in no case is the tenant allowed to cut timber for sale, unless this is the customary mode of using the land.²

§ 75. Continued — In respect to minerals and other deposits. — The tenant is not permitted to dig and sell gravel, clay and other deposits, which may be found thereon, or to use the clay for the purpose of making bricks.³ If, however, it had been the custom with previous owners to make such use of the land, the tenant may continue to use what pits and mines are already opened, but he cannot open new ones.⁴ In the case of minerals he may follow the same

Ala. 514. See *contra*, Connor v. Shepherd, 15 Ma-s. 164. But it must be with the *bona fide* intention to clear the land. If, under this pretence, the tenant is really cutting for the purpose of profiting by the sale of the wood, it will be waste, notwithstanding the land is made more valuable by being cleared. See Kidd v. Dennison, 6 Barb. 8; Davis v. Gilliam, *supra*.

¹ Davis v. Gilliam, 5 Ired. Eq. 311; Crockett v. Crockett, 2 Ohio St. 180.

² Chase v. Hazleton, 7 N. H. 171; Clemence v. Steere, 1 R. I. 272; Parkins v. Coxe, 2 Hayw. 339; Kidd v. Dennison, 6 Barb. 9. But if the land is customarily used in cultivating trees for sale, the tenant may follow the custom, and continue to cut and sell the wood. Bagot v. Bagot, 32 Beav. 509; Clemence v. Steere, *supra*; Ballentine v. Poyner, 2 Hayw. 110. So also if the land is let with a furnace or turpentine still, wood may be cut for use in the furnace, or the pine may be tapped for resin to be used in the still, if that had been the custom with former owners. Den v. Kenney, 5 N. J. L. 652; Findlay v. Smith, 6 Munf. 134; Carr v. Carr, 4 Dev. & B. 179. And when the cutting of some of the trees is necessary to facilitate the growth of others, the tenant may likewise cut them for that purpose. Keeler v. Eastman, 11 Vt. 293; Cowley v. Wellesley, L. R. 1 Eq. 656.

³ Co. Lit. 53 b; Huntley v. Russell, 13 Q. B. 572; Livingston v. Reynolds, 2 Hill, 157. So also to open new mines, or to make excavations in search for mines, would be waste, unless the right is expressly granted. 2 Bla. Com. 282; Saunder's Case, 5 Rep. 12; Darcy v. Askwith, Hob. 234; Stoughton v. Leigh, 1 Taunt. 410; Viner v. Vaughan, 2 Beav. 466; Irwin v. Covode, 24 Pa. St. 162; Owings v. Emery, 6 Gill, 260.

⁴ Huntley v. Russell, 13 Q. B. 591; Moyle v. Moyle, Owen. 66; Knight v. Moseley, Amb. 176; Stoughton v. Leigh, 1 Taunt. 410; Neel v. Neel, 19 Pa. St. 324; Kier v. Peterson, 41 Pa. St. 361; Crouch v. Puryear, 1 Rand. 258; Findlay v. Smith, 6 Munf. 134; Billings v. Taylor, 10 Pick. 460; Irwin v. Covode, 24 Pa. St. 162; Contes v. Cheever, 1 Cow. 460; Lenfers v. Henke, 73 Ill. 405; 24 Am. Rep. 263; Hendrix v. McBeth, 61 Ind. 473; 28 Am. Rep. 680.

vein and for the purpose may make new shafts, railroads, and other improvements.¹

§ 76. **Continued — Management and culture of land.** — At common law it was not permitted of the tenant of a particular estate to change the character of the land, as wood, pasture or arable land, and put it to a different use. Any such change in the management or culture of the land constituted waste, for which the tenant would be answerable to the reversioner.² The rule, however, in this country is, that no such change will be waste unless it results in a permanent injury to the inheritance. In each case it is a question of fact, whether a particular act is waste, and it is very largely governed by the usages and customs of the place in which the question arises.³ The tenant, however, is obliged to use the land in the manner required by the rules of good husbandry, and it will be waste if he permits the arable or meadow lands to be overgrown with brushwood, or if he exhausts the lands by unwise tillage.⁴

§ 77. **Continued — In respect to buildings.** — In like manner at common law, the strict rule was applied, that any change in the character of the building, even though it

¹ *Clavering v. Clavering*, 2 P. Wms. 388; *Billings v. Taylor*, 10 Pick. 460; *Coates v. Cheever*, 1 Cow. 460; *Irwin v. Corode*, 24 Pa. St. 162; *Lynn's Appeal*, 31 Pa. St. 45; *Kier v. Peterson*, 41 Pa. St. 361; *Crouch v. Puryear*, 1 Rand. 258; *Findlay v. Smith*, 6 Munf. 134.

² 2 Bla. Com. 282; Co. Lit. 53 *Darcy v. Askwith*, Hob. 234 a; 1 Washb. on Real Prop. 145.

³ *Keeler v. Eastman*, 11 Vt. 293; *Clemence v. Steere*, 1 R. I. 272; *Webster v. Webster*, 33 N. H. 25; *Jones v. Whitehead*, 1 Pars. 304; *Sarles v. Sarles*, 3 Sandf. 601; *McGregor v. Brown*, 10 N. Y. 118; *Crockett v. Crockett*, 2 Ohio St. 180; *Owen v. Hyde*, 6 Yerg. 334; *Proffitt v. Henderson*, 29 Mo. 327.

⁴ *Clemence v. Steere*, 1 R. I. 272; *Clark v. Holden*, 7 Gray, 8; *Sarles v. Sarles*, 3 Sandf. Ch. 601. Likewise the removal of grasses, manure made upon the land, and the digging of turf, which by the rules of good husbandry should be left upon the land to enrich it, would be waste. *Sarles v. Sarles*, *supra*; *Daniels v. Pond*, 21 Pick. 371; *Moulton v. Robinson*, 27 N. H. 550; *Plumer v. Plumer*, 30 N. H. 558; *Middlebrook v. Corwin*, 15 Wend. 169; *Lewis v. Jones*, 17 Pa. St. 262; *Harris v. Mins*, 20 W. R. 999.

resulted in a benefit to the inheritance, would be considered waste. Thus the removal of wainscots, the opening of new doors or windows, as well as the more important change of the building from a dwelling house to a store, or a change in the location of the building, were held to be waste.¹ A more liberal rule is now applied, and actual damage must be shown, in order that the action might lie.² And although even now a material and permanent change in the character of the building, and the uses to which it might be put, will not be permitted, yet any slight or immaterial change, as the cutting of a door or the opening of two rooms into one, will be permissible, whenever it is possible for the premises to be restored to its original condition at the end of his term, and in no case is it likely that the erection of new buildings will be considered waste.³ The tenant is also under obligation to keep the buildings in repair, and is responsible in damages, if he permits them to fall into decay. Tenants for life or for

¹ Co. Lit. 53 a, note 344; *City of London v. Greyne*, Cro. Jac. 181; 1 Washb. on Real Prop. 146; *Huntley v. Russell*, 13 Q. B. 588; *Greene v. Cole*, 2 Saund. 252; *Jackson v. Cator*, 5 Ves. 183; *Douglass v. Wiggins*, 1 Johns Ch. 435; *Agate v. Lowenbein*, 57 N. Y. 504; *Mannsell v. Hart*, 11 Ired. Eq. 478; *Thatcher v. Phinney*, 7 Allen's Tel. Cas. 146; *Austin v. Stevens*, 24 Me. 520; *Wall v. Hinds*, 4 Gray, 256. But he may tear down a ruinous building, which is dangerous to his cattle or to life and limb. *Clemence v. Steere*, 1 R. I. 272.

² *Young v. Spencer*, 10 B. & C. 145; *Doe v. Burlington*, 5 B. & Ad. 507; *Webster v. Webster*, 33 N. H. 25; *McGregor v. Brown*, 10 N. Y. 118; *Jackson v. Tibbits*, 3 Wend. 341; *Phillips v. Smith*, 14 Mees. & W. 595; *Jackson v. Andrew*, 18 Johns. 431.

³ *Jones v. Chappelle*, L. R. 20 Eq. 539; *Winship v. Pitts*, 3 Paige. 259; *Jackson v. Tibbits*, 3 Wend. 341; *Sarles v. Sarles*, 3 Sandf. Ch. 601; *Beers v. St. John*, 16 Conn. 329. See cases cited in notes 1 and 2, *supra*. And if the structure is an agricultural fixture, which the tenant may remove according to the law of fixtures, it is certainly no act of waste for him to put it there; and he may remove it at the expiration of the estate, if he can do so without materially injuring the inheritance. *Van Ness v. Pacard*, 2 Pet. 137; *Austin v. Stevens*, 24 Me. 520; *Clemence v. Steere*, 1 R. I. 272; *Washburne v. Sprout*, 16 Mass. 419; *McCullough v. Irvine*, 18 Pa. St. 433; *Dozier v. Gregory*, 1 Jones L. 100. But see *Maligan v. McCarthy*, 108 Mass. 376; *Benney v. Foss*, 62 Me. 251; *Conklin v. Foster*, 57 Ill. 104.

years, are required to make all the repairs necessary to keep the premises in as good condition as they were when they entered into possession; and for that purpose they may use the timber to be found on the land.¹ But the tenant is obliged to repair, even though there be no timber on the land.² He will not, however, be forced to expend any very large sums of money, where there has been any extraordinary decay or destruction of the buildings. And if the buildings were in a state of decay at the time when his term begun, he will not be called upon to repair.³ The tenant from year to year is only required to keep the buildings wind and water tight. He is not expected to provide against the ordinary wear and tear.⁴

§ 78. Continued — Acts of strangers. — The tenant is not responsible for damages done by the act of God, the public enemies, or by the law. But he is obliged to protect the premises from waste by strangers, and for the acts of such persons he is responsible to the reversioner.⁵

§ 79. Continued — Destruction of buildings by fire. — If the buildings are destroyed by fire through the carelessness of the tenant or his servants, he is responsible in

¹ 1 Washb. on Real Prop. 149; *Long v. Fitzsimmons*, 1 Watts & S. 530; *Darcy v. Askwith*, Hob. 234; *Miles v. Miles*, 32 N. H. 147; *Harder v. Harder*, 26 Barb. 409; *Sticklebone v. Hatchman*, Owen, 43; *Walls v. Hinds*, 4 Gray, 256; *Griffith's Case*, Moore, 69; Co. Lit. 53 a; *Wilson v. Edmonds*, 24 N. H. 517; *Kearney v. Kearney*, 17 N. J. Eq. 504; *Harvey v. Harvey*, 41 Vt. 373.

² Co. Lit. 53 a; 1 Washb. on Real Prop. 149.

³ Co. Lit. 53, 54 b; *Wilson v. Edmonds*, 24 N. H. 517; *Clemence v. Steere*, 1 R. I. 272.

⁴ *Torraiano v. Young*, 6 C. & P. 8; *Answorth v. Johnson*, 5 C. & P. 239; *Bullock v. Dommit*, 6 T. R. 650; *Doe v. Amey*, 12 Ad. & E. 476; *Wise v. Metcalfe*, 10 B. & C. 299.

⁵ Co. Lit. 53 a, 54 a; *Huntley v. Russell*, 13 Q. B. 591; *Attersoll v. Stevens*, 1 Taunt. 198; *Fay v. Brewer*, 3 Pick. 203; *Pollard v. Shaffer*, 1 Dall. 210; *Wood v. Griffin*, 46 N. Y. 237; *Cook v. Champlain Trans. Co.*, 1 Denio, 91; *Austin v. Hudson R. R.*, 25 N. Y. 341; *White v. Wagner*, 4 Har. & J. 373; *Beers v. Beers*, 21 Mich. 464.

damages, but he is not liable if it is the result of an accident, and he is free from fault.¹

§ 80. **Exemption from liability.** — Although the liability for waste is an ordinary incident of all kinds of particular estates, the lessor or reversioner may by grant exempt the tenant from such liability. He is then said to have an estate for life or for years “without impeachment of waste.” Such a tenant may do any of those things enumerated above, which is usually denied to a tenant of a particular estate². But he cannot commit wilful and malicious waste, and will be restrained from doing so if he attempts it; or, if he has already done so, he will be made to respond in damages.³

§ 81. **Remedies for waste.** — If the waste is already committed, the tenant is liable to an action at law for damages. At common law, under the statutes of Marlbridge and Gloucester, the judgment was given for treble the actual damage, and the land wasted was forfeited to the reversioner.⁴ The forms of the common-law actions, as well as the nature of the judgment, are now regulated in the different States by statute, and for details the reader is referred to these statutes.⁵ If the waste is only threatened, or

¹ By statute (6 Anne, ch. 31) the English common law of liability for loss by fire was limited to cases where the fire occurred through the negligence of the tenant or his servant; and although there has been no general express re-enactment of it, the statutory qualification seems to have been generally adopted, in conformity with the statement in the text. See *Filliter v. Phippard*, 11 Q. B. 347; *Barnard v. Poor*, 21 Pick. 378; *Clark v. Foot*, 8 Johns. 421; *Lansing v. Stone*, 37 Barb. 15; *Althorff v. Wolfe*, 22 N. Y. 366; *Maull v. Wilson*, 2 Harr. 443; 4 Kent's Com. 82; 1 Washb. on Real Prop. 150, 151; *Spaulding v. Chicago and C. R. R.*, 30 Wis. 110.

² 2 Bl. 283; 1 Cruise Dig. 128; *Lewis Bowle's Case*, 11 Rep. 83; *Pyne v. Dor*, 1 T. R. 56; *Cholmeley v. Paxton*, 2 Bing. 207.

³ 1 Washb. on Real Prop. 155; *Vane v. Barnard*, 2 Vern. 738; *Marker v. Marker*, 4 Eng. Law & Eq. 95.

⁴ 5 Bla. Com. 283; 1 Washb. on Real Prop. 152.

⁵ 1 Washb. on Real Prop. 153, 157, note; 4 Kent's Com. 79. The treble damages may still be obtained in some of the States. *Sackett v. Sackett*, 8

there is danger of its repetition in the future, the equitable remedy by injunction is more salutary. The tenant is enjoined from the commission of the waste, upon pain of punishment for contempt of court.¹ An injunction will be granted in every case of waste, where irreparable injury is feared. The injury need not perhaps be very material where the question arises between persons in privity of estate; but as between strangers it is necessary to show that the danger is immediate and the probable injury material before the court will interpose.² And if injury has already been done, the court will not only grant an injunction against future waste, but it is competent for the court to inquire into the amount of damage suffered, and give judgment for the same.³ At common law the technical action for waste and treble damages could only be maintained by the tenant of an estate of inheritance immediately succeeding the particular estate. And the interposition of a freehold estate in remainder would take away his action.⁴ But the common-law action upon the *case in the nature of waste*

Pick. 306; Harder v. Harder, 26 Barb. 409; Chipman v. Emeric, 3 Cal. 283. While single damages only can be obtained in others. Smith v. Follansbee, 13 Me. 273; Harker v. Chambliss, 12 Ga. 235; Woodward v. Gates, 38 Ga. 205. In most of the States the amount of damages is regulated by statute.

¹ 2 Bla. Com. 283; Jones v. Hill, 1 Moore, 100; Tracy v. Tracy, 1 Vern. 23; Kane v. Vanderburgh, 1 Johns. Ch. 11; Harris v. Thomas, 1 Hen. & M. 18; Mayo v. Feaster, 2 McCord Ch. 137; Mollineaux v. Powell, 3 P. Wms. 268. But it has been held that statutory remedies, when they afford ample protection, supersede the equitable remedy. Cutting v. Carter, 4 Hen. & M. 424; Poindexter v. Henderson, Walk. (Mich.) 176.

² Leighton v. Leighton, 32 Me. 399; Attaquin v. Fish, 5 Metc. 140; Atkins v. Chilson, 7 Metc. 398; Rodgers v. Rodgers, 11 Barb. 595; Livingston v. Reynolds, 26 Wend. 115; Storm v. Mann, 4 Johns. Ch. 21; Georges Creek Co. v. Detmold, 1 Md. Ch. 371; Poindexter v. Henderson, Walk. (Mich.) 176; London v. Warfield, 5 J. J. Marsh. 196; White Water Canal v. Comegys, 2 Ind. 469; Field v. Jackson, 2 Dick. 599.

³ Story's Eq. Jur., sects. 517, 518; 1 Washb. on Real Prop. 161; Watson v. Hunter, 5 Johns. Ch. 170; Ware v. Ware, 6 N. J. Eq. 117.

⁴ Co. Lit. 218 b, note 122; Williams v. Balton, 3 P. Wms. 268; Bacon v. Smith, 1 Q. B. 345; Hunt v. Holl, 37 Me. 363; Peterson v. Clark, 15 Johns. 205, 206.

could be maintained by any one who had a reversionary interest in the land, and had been injured thereby.¹

§ 82. **Property in timber unlawfully cut.**—If timber is unlawfully cut from the premises, the reversioner in fee continues to have the property in it, and he may recover damages or the possession of the timber, and for that purpose he may maintain any of the personal actions of trover, replevin or *trespass de bonis*.² And the same principle is applied to any article of a personal nature, which has been unlawfully severed from the freehold.³

¹ Chase v. Hazelton, 7 N. H. 175; Williams v. Bolton, 3 P. Wms. 268. But in the Code States this distinction between trespass and trespass on the case has been abolished. Brown v. Bridges, 30 Iowa, 145.

² Lewis Bowles' Case, 11 Rep. 82; Seagram v. Knight, L. R. 2 Ch. App. 631; Richardson v. York, 14 Me. 216; Jones v. Hoar, 5 Pick. 285; Lane v. Thompson, 43 N. H. 324; Bulkley v. Dolbeare, 7 Conn. 233; Mooers v. Wait, 3 Wend. 104; Berrimann v. Peacock, 9 Bing. 386; Channon v. Patch, 5 B. & C. 897; Achey v. Hull, 7 Mich. 423; Frothingham v. McKusick, 24 Me. 403; Langdon v. Paul, 22 Vt. 205.

³ 1 Washb. on Real Prop. 155.

CHAPTER VI.

ESTATES ARISING OUT OF THE MARITAL RELATION.

SECTION I. — *Estate of husband during coverture.*

II. — *Curtesy.*

III. — *Dower.*

IV. — *Homestead.*

SECTION I.

ESTATE OF HUSBAND DURING COVERTURE.

SECTION. 90. Effect of marriage upon wife's property.

91. How husband's rights may be barred.

92. How prevented from attaching.

93. Restrictions upon alienation of wife's separate property.

94. Statutory changes in this country.

§ 90. **Effect of marriage upon wife's property.** — The legal personality of the wife is lost by marriage in that of the husband. In the eye of the common law they are considered and treated as one person, the husband being the head and representative of the duality. According to the common law, therefore, the wife cannot, during coverture, hold and be possessed of property, either real or personal, independent of her husband. Her rights become merged for the time being in his. If the property is real estate, the husband is entitled to the rents and profits which accrue during coverture.¹ If the rents, which are due, remain uncollected at his death, his personal representatives are entitled to them, in preference to the widow.² The husband is also alone authorized to sue for accruing rents.³

¹ 1 Bla. Com. 412; 1 Washb. on Real Prop. 328, 329; Williams on Real Prop. 223, 224.

² Shaw v. Partridge, 17 Vt. 626; Jones v. Patterson, 11 Barb. 572; 1 Washb. on Real Prop. 329; Williams on Real Prop. 223.

³ Babb v. Perley, 1 Me. 6; Mattocks v. Stearns, 9 Vt. 326; Fairchild v.

He can also alien his wife's lands or the rents and profits thereof during coverture.¹ His estate is a freehold estate of uncertain duration, which is limited by the continuance of the coverture, and which may last during his life.² But, notwithstanding this almost unrestricted control over her lands, the husband is not treated as having the sole seisin thereof. They are regarded as being jointly seised in fee, and in an action for injury to the inheritance, the pleadings should be in their joint names, and contain a declaration of their joint seisin.³ The husband, however, cannot incumber or alien his wife's estate in reversion. She takes it at his death, unaffected by any disposition he might have made of it during coverture.⁴

§ 91. **How husband's rights may be barred.** — His rights during coverture are barred if the wife's inheritance is forfeited for any cause; and he is divested of them by a divorce *a vinculo*.⁵

Chastelleaux, 1 Pa. St. 176. And this is true of all actions for protection of the freehold, where the inheritance is not materially affected. But where the trespass affects the inheritance, the action should be in their joint names *Babb v. Perley*, *supra*; *Dippers at Tunbridge Wells*, 2 Wils. 423; 2 Kent's Com. 131. See *post*, note 3.

¹ Co. Lit. 326 a, note 280; *Robertson v. Norris*, 11 Q. B. 916; *Trask v. Patterson*, 29 Me. 499; *McClain v. Gregg*, 2 A. K. Marsh. 454; *Mitchell v. Sevier*, 9 Humph. 146; *Williams on Real Prop.* 227. But in Massachusetts a different doctrine is held, *i.e.*, that the husband has no power to convey the wife's property without her assent, not even the estate he has during coverture. *Walsh v. Young*, 110 Mass. 396.

² Co. Lit. 351 a; *Babb v. Perley*, 1 Me. 6; *Melvin v. Proprietors*, 16 Pick. 165; 1 Washb. on Real Prop. 329.

³ Co. Lit. 67 a; *Poole v. Longueville*, 2 Saund. 283; *Polyblank v. Hawkins*, Dougl. 314; *Moore v. Vinten*, 12 Sim. Ch. 164; *Melvin v. Proprietors*, 16 Pick. 165; *Cole v. Wolcottville Mfg. Co.*, 35 Conn. 178; *Hall v. Sayre*, 10 B. Mon. 46; *Babb v. Perley*, 1 Me. 6; 2 Kent's Com. 131; 1 Washb. on Real Prop. 330.

⁴ 1 Washb. on Real Prop. 333; *Williams on Real Prop.* 223, 227; *Miller v. Snowman*, 21 Me. 201; *Bruce v. Wood*, 1 Mete. 542; *Cleary v. McDowall*, 1 Cheves, 139.

⁵ Co. Lit. 351 a; 1 Washb. on Real Prop. 330; *Burt v. Hurlburt*, 16 Vt. 292; *Oldham v. Henderson*, 5 Dana, 257

§ 92. **How prevented from attaching.** — The husband's marital rights will attach to all kinds of real property, both legal and equitable, where there is no express prohibition or release of the same. But equity very often treats a married woman as if she were single, and will protect her property against the claims of the husband, whenever it is expressly provided by the donor that she should hold and enjoy the land to her "sole" and "separate" use and free from the control of her husband. And if there be no special trustee appointed, equity will compel the husband and his privies to hold the legal estate as trustees for the separate use of the wife.¹ No particular forms of expression are required, but the intention to exclude the husband's rights must be clearly manifested, and for that purpose it is advisable to append to the *habendum* clause of the deed the words "to her sole and separate use," or others of a similar import.²

§ 93. **Restrictions upon alienation of wife's separate property.** — According to the English rule of equity, the wife is so far considered a *feme sole* that she has the power freely to dispose of her separate property by joining with her trustee in the deed of conveyance.³ This English rule has been followed in some of the States of this country,⁴

¹ 1 Washb. on Real Prop. 330; Williams on Real Prop. 224; Major v. Lansley, 2 Russ. & Mylne, 355; Porter v. Bank of Rutland, 19 Vt. 410; Stuart v. Kissam, 3 Barb. 493; Trenton Banking Co. v. Woodruff, 2 N. J. Eq. 117; Cochrane v. O'Hern, 4 Watts & S. 95; Heath v. Knapp, 4 Barr, 228; Shirley v. Shirley, 9 Paige, 364; Blanchard v. Blood, 2 Barb. 352; Fears v. Brooks, 12 Ga. 195; Steele v. Steele, 1 Ired. Eq. 452; Knight v. Bell, 22 Ala. 198; Griffith v. Griffith, 5 B. Mon. 113; Long v. White, 5 J. J. Marsh. 226.

² 1 Washb. on Real Prop. 331; Tritt v. Colwell, 31 Pa. St. 228; Fears v. Brooks, 12 Ga. 195; Goodrum v. Goodrum, 8 Ired. Eq. 313; Welch v. Welch, 14 Ala. 76. See Tidd v. Lister, 17 Eng. Law & Eq. 560; s. c., 23 Id. 578.

³ 1 Washb. on Real Prop. 331; Williams Real Prop. 224, Rawle's note; White v. Hulme, 1 Bro. C. C. 16; Brandon v. Robinson, 18 Ves. 434; Tullett v. Armstrong, 1 Beas. 1; Scarborough v. Borman, *Ib.* 34.

⁴ In New Jersey, Connecticut, Kentucky, Ohio, North Carolina, Alabama, Georgia, Missouri, Vermont and Maryland. Leaycraft v. Hedden, 4 N. J. Eq.

while in other States the contrary rule has been adopted that no disposition of the wife's separate property can be made by her or her husband, unless a power of disposition is expressly granted to her.¹ In the latter States, therefore, the wife's separate property is amply protected against the control or influence of the husband. But in England, and in those States which have adopted the English rule, he may still gain control of her property by the exercise of his persuasive powers over her. In order to afford her complete protection, it is permitted in those States to impose restrictions upon her power to alien the estate or to anticipate the income thereof.²

§ 94. **Statutory changes in this country.** — The foregoing paragraphs present the law as it obtains at common law and in this country, in the absence of remedial statutes. The common-law rights of the husband in the wife's property during coverture have been entirely taken away in some of the States, the married woman being vested, by statutes, with all the rights and capacities, in respect to her property, of a single woman, while in other States they are more or less modified and regulated by statute.³ In the limited space, which can be given to the subject, it is impos-

551; *Imlay v. Huntington*, 20 Conn. 175; *Fears v. Brooks*, 12 Ga. 198; *Collins v. Larenburg*, 19 Ga. 685; *Cooke v. Husbands*, 11 Md. 492; *Cleman v. Wooley*, 10 B. Mon. 320; *Hardy v. Van Harlingen*, 7 Ohio St. 208; *Whitesides v. Cannon*, 23 Mo. 457; *Feary v. Booth*, 4 Am. Law Reg. (N. S.) 141, note; *Frazier v. Brownlow*, 3 Ired. Eq. 237. In New York, the English rule formerly prevailed. *Dyett v. North American Coal Co.*, 20 Wend. 570. But now the matter is regulated by local statute, and the wife's power over her separate estate has been greatly restricted. *Rogers v. Ludlow*, 3 Sandf. Ch. 104; *Leggett v. Perkins*, 2 N. Y. 297. See *post*, sect. —, note.

¹ In Pennsylvania, Rhode Island, Virginia, South Carolina, Mississippi, and Tennessee. *Wright v. Brown*, 8 Wright, 204; *Metcalf v. Cooke*, 2 R. I. 355; *Williamson v. Beekham*, 8 Leigh. 20; *Ewing v. Smith*, 3 DeSau. 417; *Doty v. Mitchell*, 9 Smed. & M. 447; *Marshall v. Stephens*, 8 Humph. 159. See *post*, sect. —, note.

² 1 Washb. on Real Prop. 331; Williams on Real Prop. 225; cases cited in notes (11, 12, 13). See also *post*, —, sects.

³ See 1 Washb. on Real Prop. 335-341, note.

sible to give the law of each State in detail, as it has been modified by statute. But the following brief and general statement may be taken as reasonably accurate: In California, Colorado, Dakota, Delaware, Florida, Illinois, Indiana, Iowa, Kansas, Michigan, Mississippi, Minnesota, New Jersey, Nevada, New York, Pennsylvania, South Carolina, Texas, and Wisconsin, the common law estate during coverture has been practically abolished, except that in Florida, Indiana, Mississippi, Minnesota, New Jersey, Nevada and Pennsylvania, in order to convey her property, the husband must join in the deed, and in Texas he is held to have the management of her lands during coverture. In Alabama, Arkansas, Connecticut, Maryland, Missouri, Rhode Island, Tennessee and Vermont, the common-law rights of the husband in his wife's property have been more or less modified, the chief provision being, that his creditors cannot levy upon it for his debts. In New Hampshire and Ohio, all lands acquired by the wife by devise, conveyance, or purchase with her own funds, shall be her separate property free from the common-law rights of the husband, but she cannot convey her lands, without joining with the husband. In California, Dakota, Nevada, and Texas, the "partnership" theory of marriage, borrowed from the civil or Roman law, and in force in Louisiana, has been adopted, and a statute declares that all lands purchased by the husband or wife with funds earned by their labor, shall be the common property of both, and one-half goes to the heirs of each, or it may be conveyed away during his or her lifetime, without the co-operation of the other. It is evident from this brief synopsis, that an accurate knowledge of the law of married women, in any given State, can only be had by a careful study of the statutes and decisions of that State. A general treatise of limited scope can only give an outline of the subject.¹

¹ See 1 Washb. on Real Prop. 335-341, note.

SECTION II.

ESTATE BY CURTESY.

SECTION 101. Definition.

- 102. Marriage.
- 103. Estate of inheritance necessary in the wife.
- 104. Curtesy in fees determinable.
- 105. Curtesy in equitable estates.
- 106. Seisin in wife during coverture.
- 107. Curtesy in reversion.
- 108. Necessity of issue.
- 109. Liability for husband's debts.
- 110. How estate may be defeated.

§ 101. **Definition.** — An estate by the curtesy is a freehold estate, limited by operation of law to the husband for life in the lands and tenement of the wife, in which she was seised of an estate of inheritance during coverture. The estate by curtesy becomes initiate upon the birth of issue, born alive and capable of inheriting the estate, and takes effect in possession upon the death of the wife.¹ It does not exist in Louisiana, California, Indiana, Michigan, South Carolina, Georgia, Kansas, and Texas.² The requisites of

¹ Co. Lit. 30 a; 2 Bla. Com. 126; 1 Washb. on Real Prop. 163; Williams on Real Prop. 227.

² 1 Washb. on Real Prop. 164; *Tong v. Marvin*, 15 Mich. 73; *Portis v. Parker*, 22 Texas, 699. But it is either recognized by the courts, or expressly given by statute, in the other States. *Adair v. Lott*, 3 Hill, 186; *Thurber v. Townshend*, 22 N. Y. 517; *Armstrong v. Wilson*, 60 Ill. 226; *Reaume v. Chambers*, 22 Mo. 36; *Malone v. McLaurin*, 40 Miss. 162; *McCorry v. King's Heirs*, 3 Humph. 267; *Carr v. Givens*, 9 Bush, 679; s. c., 15 Am. Rep. 747. In South Carolina, it has been lately decided that the statute of 1791 only abolished curtesy in fees simple; and that it still exists in a fee conditional. *Withers v. Jenkins*, 14 S. C. 597. The position of the South Carolina court, that curtesy in fees simple is abolished, is based upon an erroneous construction of the act of 1791. That act gave the husband the same interest in the lands and other property of his deceased wife, as was given to the wife in her

the estate by curtesy are: 1. Lawful marriage; 2. Seisin of wife during coverture; 3. Birth of a living child in the life time of the wife; 4. The death of the wife.

§ 102. **Marriage.** — The marriage must be a lawful one. If the marriage be void because of some illegality, curtesy does not attach; but if the marriage is only voidable, the husband will have curtesy, unless it be actually declared void during the life of the wife.¹ And in some of the States, a dissolution of the marriage by decree of court at the suit of the wife for the fault of the husband, will take away the husband's estate by curtesy.²

§ 103. **Estate of inheritance necessary in the wife.** — In order that curtesy may attach, the estate of the wife must be a freehold of inheritance, and no form of conveyance of a common-law legal estate of inheritance can be devised by which the husband may be deprived of his curtesy therein.³ But the legal estate, of which the wife may be possessed as trustee, is not subject to the husband's curtesy.⁴

§ 104. **Curtesy in fees determinable.** — In respect to deceased husband's property, that is, he was included in the Statute of Descent as an heir of the wife. The court holds that the estate by curtesy was impliedly abolished, whereas the proper construction is, that he is put to his election, and cannot take both the curtesy and the statutory provision. This construction is universally recognized and adopted in the parallel case of the widow, who is entitled to dower and is also made statutory heir. She may take her dower, but cannot take both.

¹ 1 Washb. on Real Prop. 165.

² This is the law in Maine, Massachusetts, Vermont, Connecticut, New York, Delaware, Indiana, Kentucky, Rhode Island, Arkansas, New Hampshire, Missouri, Minnesota, Ohio, New Jersey, Illinois, Maryland. 1 Washb. on Real Prop. 309-312, note; Bishop's Mar. & Div., sect. 666; 1 Greenl. Cruise, 150.

³ Mildmay's Case, 6 Rep. 41; Mullany v. Mullany, 4 N. J. Eq. 16; Williams on Real Prop. 328; 1 Washb. on Real Prop. 169.

⁴ Chew v. Commissioners, 5 Rawle, 160. And this is true, whether the trust is express or implied by law from the wife's contract, entered into before marriage, to sell the land. Welsh v. Chandler, 13 B. Mon. 431.

the right of curtesy in fees simple and fees tail, no question can arise, as explained in a preceding paragraph. If, however, the estate be a fee upon condition, upon limitation, or a conditional limitation, some difficulty is experienced in determining what effect the happening of the condition or contingency would have upon the husband's curtesy. The following may be stated as the prevailing rule: If the estate of the wife be one upon condition or upon limitation, estates which take effect and are determined according to the rules of the common law, and the limitation overtakes effect as common-law estates, as in the case of a remainder after an estate upon limitation, the husband's curtesy is defeated.¹ But, by a refinement of distinction, which is difficult to comprehend, if the estate be a fee determinable upon the happening of some future event, and the limitation over be by way of executory devise, or shifting use, or in other words a conditional limitation, the estate by curtesy still exists, unaffected by the happening of the contingency.²

§ 105. **Curtesy in equitable estates.** — It was once held that the husband was not entitled to curtesy out of the equitable estates of the wife. But it is now very generally conceded that he has curtesy in all equitable as well as legal estates, and the same rules are applied to the former, which obtain in the latter. For the foundation of the claim of curtesy, the receipt by the wife of the rents and profits is a sufficient seisin.³ And this is true even of those equit-

¹ Co. Lit. 241, Butler's note, 170; 1 Washb. on Real Prop. 167, 168, 170.

² *Buckworth v. Thirkell*, 3 B. & P. 652; *Moody v. King*, 2 Bing. 447; *Hatfield v. Sneden*, 54 N. Y. 285; *Grant v. Townshend*, 2 Hill, 554; *Evans v. Evans*, 9 Pa. St. 190; *Wright v. Herron*, 6 Rich. Eq. 406. See 1 Washb. on Real Prop. 171, 172; Co. Lit. 241 a, Butler's note, 170; 4 Kent's Com. 33. See *post*, sect. 129, note.

³ 4 Kent's Com. 31; 1 Washb. on Real Prop. 165, 166; *Watts v. Ball*, 1 P. Wms. 109; *Morgan v. Morgan*, 5 Madd. 408; *Sweetapple v. Bindon*, 2 Vern. 537, note 3; *Davis v. Mason*, 1 Pet. 508; *Houghton v. Hapgood*, 13 Pick. 154; *Robinson v. Codman*, 1 Sumn. 128; *Dunscomb v. Dunscomb*, 1

able estates which are granted to her sole and separate use.¹ But equitable estates will not be subject to the right of curtesy, if the intention of the grantor, to exclude the husband from such equitable estate, is clearly manifested in the deed.²

§ 106. **Seisin in wife during coverture.** — Another requisite of the estate by curtesy is, that the wife must be seised of the estate during coverture. The actual seisin was required at common law, but at the present day, in this country, all that is required is legal seisin, which is a present right to the possession. But adverse possession will preclude the husband's right of curtesy, if the seisin is not regained during coverture. In the absence of such adverse possession, actual possession is not required.³ In England, in case of the descent of lands upon the wife, an entry by the husband during coverture is necessary to support his right to curtesy. But it is the general rule in this country, that

Johns. 508; *Clepper v. Livergood*, 5 Watts, 113; *Dubs v. Dubs*, 31 Pa. St. 154; *Rawlings v. Adams*, 7 Md. 54; *Forbes v. Smith*, 5 Ired. Eq. 369; *Withers v. Jenkins*, 14 S. C. 597; *Alexander v. Warrance*, 17 Mo. 228. In several of the States, notably, Alabama, Kentucky, Maryland, Mississippi, and Virginia, curtesy is by statute made to attach to equitable estates. 1 Greenl. Cruise, 157.

¹ *Tillinghast v. Coggeshall*, 7 R. I. 383; *Nightingale v. Hidden*, *Id.* 115; *Sartill v. Robeson*, 2 Jones Eq. 510; *Carter v. Dale*, 3 Lea, 710; 31 Am. Rep. 660. But see *Moore v. Webster*, L. R. 23 Eq. 267; *Appleton v. Rowley*, L. R. 8 Eq. 139; and cases cited in note 2.

² *Carter v. Dale*, 3 Lea, 710; 31 Am. Law Rep. 660; *Stokes v. McKibbin*, 13 Pa. St. 207; *Cochran v. O'Hern*, 4 Watts & S. 95; *Rigler v. Cloud*, 14 Pa. St. 361; *Clark v. Clark*, 24 Barb. 582; *Pool v. Blaikie*, 53 Ill. 495; *Hearle v. Greenbank*, 3 Atk. 716; *Bennett v. Davis*, 2 P. Wms. 316; 1 Washb. on Real Prop. 165-169.

³ 4 Kent's Com. 30 n; *Davis v. Mason*, 1 Pet. 506; *Jackson v. Sellick*, 8 Johns. 262; *Den v. Demarest*, 1 N. J. L. 525; *Ellsworth v. Cook*, 8 Paige Ch. 640; *Jackson v. Johnson*, 5 Cow. 74; *Bar v. Galloway*, 1 McLean, 476; *Pierce v. Wanett*, 10 Ired. 446; *Merceer v. Selden*, 1 How. 37; *McCorry v. King's Heirs*, 3 Humph. 267; *Day v. Cochran*, 24 Miss. 277; *McDaniel v. Grace*, 15 Ark. 465; *Adams v. Logan*, 6 Mon. 175; *Neely v. Butler*, 10 B. Mon. 48; *Reaume v. Chambers*, 22 Mo. 541; *Wells v. Thompson*, 13 Ala. 793; *Stinebaugh v. Wisdom*, 13 B. Mon. 467.

actual entry is not required,¹ and in Pennsylvania, Ohio, and Connecticut, adverse possession does not necessitate an actual *entry*.² If the lands are in possession of a co-tenant in a tenancy in common, the wife is deemed sufficiently seised in order to give the husband curtesy, and such would also be the case, where a tenant for years or at sufferance has possession by lease from the wife. The tenant in such a case holds the actual seisin or possession as a *quasi bailee* of the reversioner.³

§ 107. **Curtesy in reversion.** — But if the estate of the wife be a reversion or a remainder, supported and preceded by a particular freehold estate, she will not have such a present right to the possession, as to give her husband curtesy, unless the prior freehold is determined during coverture, and this, too, though the husband is the tenant of the prior freehold.⁴ The husband in such cases can only have curtesy, when, during coverture, the particular freehold is determined or is merged in the reversion by coming into the same hands.⁵

§ 108. **Necessity of issue.** — The estate by curtesy is by the theory of the law only a continuance of the wife's estate of inheritance, and is supposed to be intrusted to him

¹ Co. Lit. 29 a.; 1 Washb. on Real Prop. 173, 174; *Adair v. Lott*, 3 Hill, 182; *Jackson v. Johnson*, 5 Cow. 74; *Chew v. Commissioners*, 5 Rawle, 160, *Day v. Cochrane*, 24 Miss. 261; *Stephens v. Hume*, 25 Mo. 349; *Harvey v. Wichman*, 23 Ib. 115; *Carr v. Givens*, 9 Bush, 679; *s. c.*, 15 Am. Rep. 747.

² *Stoolfoos v. Jenkins*, 8 Serg. & R. 175; *Bush v. Bradley*, 4 Day, 298; *Borland v. Marshall*, 2 Ohio St. 303; *Merritt v. Horne*, 5 Ohio St. 307; *Kline v. Beebe*, 6 Conn. 494. *Contra*, *Mercer's Lessee v. Selden*, 1 How. 154.

³ *De Grey v. Richardson*, 3 Atk. 469; *Green v. Lister*, 8 Cranch, 245; *Wass v. Bucknam*, 35 Me. 360; *Taylor v. Gould*, 10 Barb. 388; *Jackson v. Johnson*; 5 Cow. 74; *Carter v. Williams*, 8 Ired. Eq. 177; *Powell v. Gossom*, 18 B. Mon. 179; *Vanarsdall v. Fauntleroy*, 7 B. Mon. 401; *Day v. Cochrane*, 24 Miss. 261.

⁴ *Stoddard v. Gibbs*, 1 Sumn. 263; *Ferguson v. Tweedy*, 43 N. Y. 543; *Orford v. Benton*, 36 N. H. 395; *Shores v. Carley*, 8 Allen, 426; *Hitner v. Ege*, 23 Pa. St. 305; *Robertson v. Stevens*, 1 Ired. Eq. 247; *Malone v. McLaurin*, 40 Miss. 163; *Planter's Bank v. Davis*, 31 Ala. 633; *Doe v. Rivers*, 9 T. R. 272.

⁵ 1 Washb. on Real Prop. 175-178; *Doe v. Scuddamore*, 2 B. & P. 294; *Plunket v. Holmes*, 1 Lev. 11; 1 Cruise Dig. 149.

during life for the benefit of the wife's issue. It is therefore necessary by the common law, that the wife should have issue born alive, who can take the inheritance as heir to the wife. A female child in the case of a tail male would not satisfy this requirement.¹ His right becomes initiate upon the birth of the child, and attaches and vests in possession, whether it was born before or after the acquisition of the estate; and, provided it was born alive, its death at any time would not affect the husband's right of curtesy.² In Pennsylvania, by statute, the birth of a child is not necessary.³ The issue must not only be born alive and capable of inheriting the estate, but it must also at common law have been born during the life time of the mother. The birth of the child after her death, by means of the Cæsarian operation, would not give the husband curtesy.⁴

§ 109. **Liability for husband's debts.** — As soon as the right becomes initiate by the birth of the child as well as after it is consummate, it may be subjected to the satisfaction of the husband's debts and can be sold under a levy of execution.⁵ Equity will not interfere in behalf of the wife or children.⁶

¹ Co. Lit. 29 b; 1 Washb. on Real Prop. 178; Williams on Real Prop. 228; Heath v. White, 5 Conn. 228; Day v. Cochrane, 24 Miss. 261.

² 2 Bla. Com. 128; 1 Washb. on Real Prop. 179; Witham v. Perkins, 2 Me. 400; Comer v. Chamberlin, 6 Allen, 166; Watson v. Watson, 13 Conn. 83; Jackson v. Johnson, 5 Cow. 74; Guion v. Anderson, 8 Humph. 307. The husband's right of curtesy, upon birth of a child by him, takes precedence to any claim by descent of a son of the wife by a prior marriage. Heath v. White, 5 Conn. 236. The law is different in Michigan by statute. Hathorn v. Lyon, 2 Mich. 93.

³ Williams on Real Prop. 228, Rawle's note; Dubs v. Dubs, 31 Pa. St. 154; Lancaster Co. Bank v. Stauffer, 19 Pa. St. 398.

⁴ 1 Washb. on Real Prop. 179; Co. Lit. 29 b; 1 Greenl. Cruise, 143, note; Marsellis v. Thalheimer, 2 Paige Ch. 42.

⁵ Mattocks v. Stearns, 9 Vt. 326; Roberts v. Whiting, 16 Mass. 186; Litchfield v. Cudworth, 15 Pick. 23; Watson v. Watson, 13 Conn. 83; Burd v. Dausdale, 2 Binn. 80; Lancaster Co. Bank v. Stauffer, 10 Pa. St. 398; Van Duzer v. Van Duzer, 6 Paige, 366; Day v. Cochrane, 24 Miss. 261; Canby v. Porter, 12 Ohio, 79. But see Harvey v. Wickham, 23 Mo. 117.

⁶ Van Duzer v. Van Duzer, 6 Paige, 366.

§ 110. **How estate may be defeated.** — A *divorce a vinculo*, as has been seen, will defeat the husband's right of curtesy, where it is granted for his fault.¹ It was also the rule at common law that a feoffment in fee by the husband would destroy his tenancy by curtesy. But although the same rule is now enforced in this country in regard to feoffments, wherever they still obtain, and it is not changed by statute, yet the ordinary conveyance is held to transfer only what the grantor has, and will not work a forfeiture of his actual estate.² In a preceding section it has been stated that in a number of the States, statutes have been passed, which enable a married woman to hold property as free from marital rights, as if she were single. In New York, where the change was first made, it has been held that the common-law right to curtesy still exists, but it may be defeated by the conveyance of the wife during coverture.³

¹ See *ante*, sect. 102.

² *French v. Rollins*, 21 Me. 372; *Flagg v. Bean*, 25 N. H. 63; *Dennett v. Dennett*, 40 N. H. 505; *McKee v. Pfont*, 3 Dall. 486; *Munneslyn v. Munneslyn*, 2 Brev. 2; *Butterfield v. Beall*, 3 Ind. 203; *Meramec v. Caldwell*, 8 B. Mon. 32; *Baykin v. Rain*, 28 Ala. 332; *Miller v. Miller*, Meigs, 484.

³ *Clark v. Clark*, 24 Barb. 581; *Thurber v. Townshend*, 22 N. Y. 517. But it seems that under the New York statute, the tenancy by the curtesy vests only where the land remains undisposed of by deed or by will. A devise of the lands would therefore defeat the tenancy. See *Burke v. Valentine*, 52 Barb. 412; *Scott v. Guernsey*, 60 Barb. 163; *Rider v. Hulse*, 24 N. Y. 372.

SECTION III.

DOWER.

- SECTION 115.** Dower defined and explained.
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 - 147. Dower barred by jointure.
 - 148. Continued — By testamentary provision.

§ 115. **Dower defined and explained.** — Dower is that interest or estate which is provided by the law for the widow out of the real property of the husband. At common law,

and generally in this country, it is an estate for life in one-third of his lands, tenements, and hereditaments.¹ During coverture, her interest, though an incumbrance, is but an inchoate right, which she can neither assign, release, nor extinguish, except by joining in the deed of her husband, as explained later on. It cannot at this stage be considered even a *chose in action*; and it is not affected by any adverse possession, although such possession is sufficient to bar the husband's interest in the land.² Upon the death of the husband, the wife surviving, the right becomes consummate; it is then a *chose in action* which entitles her to have certain of her husband's lands set out to her. She has not yet an estate, simply a consummate right to an estate, which she can assign in equity, and release at common law to one in possession, but which was incapable of assignment at common law, like all other *choses in action*.³ It only becomes

¹ 2 Bla. Com. 180; Co. Lit. 30 a; 1 Washb. on Real Prop. 187-189; Moore v. New York, 8 N. Y. 110; Reaume v. Chambers, 22 Mo. 36. In some of the States, the widow has one-third in fee, instead of for life, while in others it is enlarged to one-half, but except in respect to quantity, the estate has the same general qualities throughout the United States. See Burke v. Barron, 8 Iowa 134; O'Ferrall v. Simplot, 4 Iowa, 381; Lucas v. Sawyer, 17 Iowa, 519; Sturgis v. Ewing, 18 Ill. 176; Noel v. Ewing, 9 Ind. 87; Gaylord v. Dodge, 13 Ind. 47. In Louisiana and California, the widow has one-half of all the common property of her husband. Beard v. Knox, 5 Cal. 252. And, although there are statutes in a number of the States giving the widow an interest in the personal, as well as the real property of the husband, dower technically can only be had out of real estate of inheritance as above stated. Dow v. Dow, 36 Me. 211; see *post*, sect. 116.

² Durham v. Angier, 20 Me. 242; Moore v. Frost, 3 N. H. 127; Gunnison v. Twitchell, 38 N. H. 68; Learned v. Cutler, 18 Pick. 9; Moore v. New York, 8 N. Y. 110; McArthur v. Franklin, 16 Ohio St. 200. But it is so far an interest in the land, that if the renunciation of her dower right has been obtained by fraud of her husband with knowledge of the purchaser, the wife may avoid the deed in respect to her inchoate dower right. Somar v. Canady, 53 N. Y. 298; 13 Am. Rep. 523; Buzick v. Buzick, 44 Iowa, 259; 24 Am. Rep. 740; White v. Graves, 107 Mass. 325; 9 Am. Rep. 38.

³ Johnson v. Shields, 32 Me. 424; Hoxsie v. Ellis, 4 R. I. 123; Sheafe v. O'Neil, 9 Mass. 9; Gooch v. Atkins, 14 Mass. 378; Lund v. Woods, 11 Metc., 566; Croade v. Ingraham, 13 Pick. 33; Tompkins v. Fonda, 4 Paige Ch. 448; Jackson v. Vanderheyden, 17 Johns. 167; Cox v. Jagger, 2 Cow. 651; Stewart v. McMartin, 5 Barb. 438; Harrison v. Wood, 1 Dev. & B. Eq. 437; Salt-

an estate in the lands, when it has been set out to her. The act of setting out the dower is called *the assignment of dower*. From this time on, she has a life estate, with all the rights, incidents, and disabilities, which pertain to that class of estates.¹ In some of the States, the wife holds her dower subject to the claims of her husband's creditors, but as a general rule her dower right takes precedence to such claims.²

marsh v. Smith, 32 Ala. 404; Strong v. Bragg, 7 Blackf. 63; Summers v. Babb, 13 Ill. 483; Blain v. Harrison, 11 Ill. 384; Torrey v. Minor, 1 Smed. & M. Ch. 489; Shield v. Batts, 5 J. J. Marsh. 12; Stewart v. Chadwick, 8 Iowa, 463; Brown v. Meredith, 2 Keen, 527; Corey v. The People, 45 Barb. 265. And likewise the dower right before assignment cannot be sold under attachment or execution. Rausch v. Moore, 48 Iowa, 611; 30 Am. Rep. 412; Brown v. Meredith, 2 Keen, 527; Gooch v. Atkins, 14 Mass. 378; Green v. Putnam, 1 Barb. 500; Saltmarsh v. Smith, 32 Ala. 404. In Vermont and Connecticut she is held to have an estate in common with the heirs from the death of the husband. Dummerston v. Newfane, 37 Vt. 13; Wooster v. Hunt's Lyman Iron Co., 38 Conn. 257. In Alabama and Indiana she has such an interest in the land, as that it may be assigned before it has been set out. Powell v. Powell, 10 Ala. 900; Strong v. Clem, 12 Ind. 37. And even when the dower right before assignment cannot in law be conveyed, except by way of release to the tenant of the freehold, a conveyance or assignment to a stranger will be valid in equity, and the assignee may bring the action for assignment in the name of the widow. Robie v. Flanders, 33 N. H. 524; Lamar v. Scott, 4 Rich. Eq. 516; Potter v. Everitt, 7 Ired. Eq. 152; Powell v. Powell, 10 Ala. 900.

¹ Windham v. Portland, 4 Mass. 384; Jones v. Brewer, 1 Pick. 314; Powell v. Monson, 3 Mason, 368; Lawrence v. Brown, 5 N. Y. 394; Andrews v. Andrews, 14 N. J. L. 141; Norwood v. Marrow, 4 Dev. & B. 442; Sutton v. Burrows, 2 Murph. 79; Thompson v. Stacy, 10 Yerg. 423. As soon as judgment has been entered up, she may release or transfer the estate. Leavitt v. Lamprey, 13 Pick. 382. And when the *habere facias* has been issued, she may enter upon the land. Co. Lit. 37 b, n; Parker v. Parker, 17 Pick. 236; Evans v. Webb, 4 Yeates, 424. But if the assignment is subsequently set aside, she may be treated as a disseisor or trespasser from the time of her entry. 4 Kent's Com. 61; Hildreth v. Thompson, 16 Mass. 191; Jackson v. O'Donaghy, 7 Johns. 247; Sharpley v. Jones, 5 Harr. 373; McCully v. Smith, 2 Bail. 103. After it is set out to her, she holds her dower land of her husband, and not of the heir or tenant. It is not the grant of the heir, and the grant by the heir of the dower land after her death, incorporated in the deed of assignment, is a grant of the reversion and not of a technical remainder. Baker v. Baker, 4 Me. 67; Conant v. Little, 1 Pick. 189; Adams v. Butts, 9 Conn. 79; Lawrence v. Brown, 5 N. Y. 394.

² When it is stated that in some of the States the dower right is subject to

§ 116. **In what estates has she dower.** — The widow has dower in all freehold estates of inheritance, which her issue, if any, could have inherited as heir of the husband, and of which he was seised during coverture. It therefore includes everything that is comprehended under the terms lands, tenements, and hereditaments, corporeal and incorporeal.¹ She has no dower in estates *per auter vie*, or for years, except where these estates, or certain of them, are given by statute the incidents and characteristics of freehold estates of inheritance.² The inheritance must also be a continuous

the claims of creditors, it is meant that a judicial sale for debt will bar the wife's dower right, and, it being inchoate, she cannot protect it. *Kirke v. Dean*, 2 Binn. 347; *Reed v. Morrison*, 12 Serg. & R. 18; *Lozear v. Porter*, 87 Pa. St. 513; 30 Am. Rep. 380. But it will not be barred by the assignment for benefit of creditors, or by sale in bankruptcy. *Keller v. Michael*, 2 Yeates 300; *Eberle v. Fisher*, 13 Pa. St. 526; *Lozear v. Porter*, 87 Pa. St. 513; 30 Am. Rep. 380. But the general rule is, that it cannot in any manner be barred by a sale for debts. *Stinson v. Sumner*, 9 Mass. 149; *Griffin v. Reece*, 1 Harr. 508; *Lewis v. Coxe*, 5 Harr. 403; *Hinchman v. Stiles*, 10 N. J. Eq. 361; *Coombs v. Young*, 4 Yerg. 218; *Sisk v. Smith*, 6 Ill. 503. But if the land is under attachment before marriage, a sale of it will defeat the wife's dower. *Brown v. Williams*, 31 Me. 403; *Sanford v. McLean*, 3 Paige, 117.

¹ 2 Bla. Com. 131; Co. Lit. 40 a; 1 Washb. on Real Prop. 193–195. Dower may be claimed out of rents and other incorporeal hereditaments, except annuities not issuing out of land. Co. Lit. 32 a; 2 Bla. Com. 132; *Aubin v. Daly*, 4 B. & Ald. 59; *Chase's Case*, 1 Bland, 227; 4 Kent's Com. 401. But the incorporeal hereditament, like corporeal hereditaments, must be an estate of inheritance. 1 Washb. on Real Prop. 210; *Stoughton v. Leigh*, 1 Taunt. 410; *Weir v. Tate*, 4 Ired. Eq. 264; *Chase's Case*, 1 Bland, 227. She has dower in the crops planted by her husband, and growing at his decease. 1 Washb. on Real Prop. 211; *Ralston v. Ralston*, 3 Greene (Iowa), 533. In Massachusetts, she is not dowable in wild lands. *Conner v. Shepherd*, 15 Mass. 164. But in the other States, since the tenant for life has a right to clear wild lands, in order to make them available for use, the widow is granted her dower in such land. 4 Kent's Com. 76; *Hastings v. Cruckleton*, 3 Yeates, 261; *Findlay v. Smith*, 6 Munf. 134; *Ballantine v. Payner*, 2 Hayw. 110; *Owen v. Hyde*, 6 Yerg. 334; *Alexander v. Fisher*, 7 Ala. 514. See *ante*, sect. 74. She is likewise dowable in the mines, which were opened and worked by her husband. *Lenfers v. Henke*, 73 Ill. 405; 24 Am. Rep. 263; *Hendrix v. McBeth*, 61 Ind. 473; 28 Am. Rep. 680; *ante*, sect. 75.

² *Gillis v. Brown*, 5 Cow. 388; *Spangler v. Spangler*, 1 Md. Ch. 36; *Fisher v. Grimes*, 1 Smed. & M. Ch. 107; *Ware v. Washington*, 6 Smed. & M. 737; *Burris v. Page*, 12 Mo. 358; 1 Washb. on Real Prop. 194, 195. But see *Goodwin v. Goodwin*, 33 Conn. 314, which holds that the widow

and entire one. The interposition of a freehold estate between the husband's estate in possession and his reversion or remainder in fee will prevent the wife's dower from attaching. It can only attach when the interposed freehold terminates during coverture.¹ Nor can she for the same reason have dower in lands, which her husband holds in joint tenancy, until the tenancy has been terminated by partition or by the death of the other tenant.² But the estate of a tenant in common is subject to dower; the dower attaches to the husband's undivided interest in the land before partition, and afterwards to the share set out to him.³ Estates held by a partnership for partnership purposes are also subject to dower; but the dower is subordinate to the demands that might be made by partnership creditors against the partnership property.⁴

has no dower out of an estate for 999 years, although the statute converts this leasehold into an estate of inheritance. Concerning estates *per auter vie*, see *ante*, sect. 61; and in respect to leaseholds made estates of inheritance, see *post*, sect. 171.

¹ *Lewis Bowle's Case*, 11 Rep. 80; *Crump v. Norwood*, 7 Taunt. 362; *Eldridge v. Forrestal*, 7 Mass. 253; *Brooks v. Everett*, 13 Allen, 458; *Blood v. Blood*, 23 Pick. 80; *Robison v. Codman*, 1 Sumn. 130; *Fisk v. Eastman*, 5 N. H. 240; *Otis v. Parshley*, 10 N. H. 403; *Dunham v. Osborne*, 1 Paige, 634; *Durando v. Durando*, 23 N. Y. 331; *Gardner v. Greene*, 5 R. I. 104; *Shoemaker v. Walker*, 2 Serg. & R. 556; *Arnold v. Arnold*, 8 B. Mon. 202; *Apple v. Apple*, 1 Head, 348; 4 Kent's Com. 39; 1 Washb. on Real Prop. 195. But if the interposed estate be one for years, it will not affect the dower right, since the entire seisin is in the husband. *Bates v. Bates*, 1 Ld. Raym. 326; *Hitchens v. Hitchens*, 2 Vern. 403. According to the early common law, a contingent remainder would be defeated by the coming together of the reversion and the life estate in one person. It was then held that the widow would have dower, notwithstanding the interposed contingent remainder. *Hooker v. Hooker*, Ca. Temp. H. 13; *Purefoy v. Rogers*, 2 Saund. 380. But the contingent remainder cannot now be defeated by merger of the life estate in the reversion. 1 Washb. on Real Prop. 197; *Williams on Real Prop.* 281, 282.

² 1 Washb. on Real Prop. 198; Co. Lit. 37 b; *Duncomb v. Duncomb*, 3 Lev. 437; *Maybury v. Brien*, 15 Pet. 21. See *post*, sects. 237-239.

³ 1 Washb. on Real Prop. 199; *Reynard v. Spence*, 4 Beav. 103; *Potter v. Wheeler*, 13 Mass. 504; *Totten v. Stuyvesant*, 3 Edw. Ch. 500; *Wilkinson v. Parish*, 3 Paige, 653; *Lloyd v. Conover*, 25 N. J. L. 48; *Warren v. Twilley*, 10 Md. 39; *Davis v. Bartholomew*, 3 Ind. 485; *Weaver v. Gregg*, 6 Ohio St. 547; *Lee v. Lindell*, 22 Mo. 202.

⁴ *Burnside v. Merrick*, 4 Metc. 537; *Dyer v. Clark*, 5 Metc. 562; *Smith v.*

§ 117. **Dower in equitable estates.** — According to the early English law there was no dower in equitable estates, and the Statute of Uses expressly excepted the estates executed by it from the claims of dower.¹ But at present, in England, and generally in this country, the widow is entitled to dower in all classes of equitable, as well as legal, estates.² In the same manner now, she has dower in the husband's equity of redemption, which gives her the right of one, who is interested in the mortgaged property, subject to the mortgage.³

Jackson, 2 Edw. Ch. 28; *Coster v. Clark*, 3 Edw. Ch. 428; *Hawley v. James*, 5 Paige, 451; *Goodburn v. Stevens*, 1 Md. Ch. 437; *Pierce v. Trigg*, 10 Leigh, 406; *Richardson v. Wyatt*, 2 Desau. 471; *Loubat v. Nourse*, 5 Fla. 350; *Sumner v. Hampson*, 8 Harr. 328; *Woolridge v. Williams*, 3 How. (Miss.) 372; *Hale v. Plummer*, 6 Ind. 121; *Bopp v. Fox*, 63 Ill. 540; *Duhring v. Duhring*, 20 Mo. 174. But in order that the claims of the creditors may take precedence of the widow's dower in respect to the land held by two or more, the land must be in truth the property of the partnership. The character of their joint estate is determined entirely by their intention, and it is possible for partners to hold real estate as tenants in common, without its becoming partnership property. In such a case, the widow takes her dower free from the claims of creditors. *Wheatley v. Calhoun*, 12 Leigh, 264; *Markham v. Merrett*, 8 How. (Miss.) 437; *Hale v. Plummer*, 6 Ind. 121.

¹ 1 Washb. on Real Prop. 202, 203; 4 Kent's Com. 43; 1 Spence Eq. Jur. 501; *Dixon v. Saville*, 1 Bro. C. C. 326; *D'Arcy v. Blake*, 2 Sch. & Lef. 387; *Maybury v. Brien*, 15 Pet. 38; *Hamlin v. Hamlin*, 19 Me. 141. See *post* sect. —.

² *Hawley v. James*, 5 Paige, 318; *Dubs v. Dubs*, 31 Pa. St. 151; *Shoemaker v. Walker*, 2 Serg. & R. 554; *Bowie v. Berry*, 1 Md. Ch. 452; *Miller v. Stump*, 3 Gill, 304; *Rowton v. Rowton*, 1 Hen. & M. 92; *Thompson v. Thompson*, 1 Jones (N. C.) Eq. 430; *Dawson v. Morton*, 6 Dana, 471; *Robinson v. Miller*, 1 B. Mon. 93; *Gully v. Ray*, 18 Ky. 113; *Barnes v. Gay*, 7 Iowa, 26; *Smiley v. Wright*, 2 Ohio, 512; *Gillespie v. Somerville*, 3 Stew. & P. 447; *Davenport v. Farrar*, 2 Ill. 314; *Atkins v. Merrill*, 39 Ill. 62. *Contra*, *Hamlin v. Hamlin*, 19 Me. 141; *Stelle v. Carroll*, 12 Pet. 201. In Iowa, a widow is not dowable in lands held by her husband under a pre-emption right. *Bowers v. Keesecker*, 14 Iowa, 301; but in several of the States it has been held that the widow has dower in lands which her husband had contracted to purchase, but he did before the deed was delivered. *Church v. Church*, 3 Sandf. Ch. 434; *Smiley v. Wright*, 2 Ohio, 512; *Robinson v. Miller*, 1 B. Mon. 93; *Davenport v. Farrar*, 2 Ill. 314; *Reed v. Whitney*, 7 Gray, 533; *Lobdell v. Hayes*, 4 Allen, 187. In some of the States the old English rule still prevails, that dower cannot be had in equitable estates. See cases cited *contra*.

³ *Smith v. Eustis*, 7 Me. 41; *Young v. Tarbell*, 37 Me. 509; *Moore v. Esty*,

§ 118. **Dower in lands of trustee.**—The wife has no dower in lands which her husband holds as trustee, except so far as he may at the same time have an equitable interest therein. And this rule is applied to every kind of trust, whether express or implied, as for example, where the husband, before marriage, has entered into a contract for the sale of the land.¹

§ 119. **Dower in mortgage.**—The mortgagee's wife has no dower in the mortgaged premises until foreclosure.

5 N. H. 479; *Eaton v. Simonds*, 14 Pick. 98; *Fay v. Cheney*, 14 Pick. 399; *Farwell v. Cotting*, 8 Allen, 211; *Hastings v. Stevens*, 29 N. Y. 564; *Savage v. Dooley*, 28 Conn. 411; *Hitchcock v. Harrington*, 6 Johns. 290; *Jackson v. Dewitt*, 6 Cow. 316; *Collins v. Torrey*, 7 Johns. 278; *Montgomery v. Bruere*, 5 N. J. L. 265; *Thompson v. Boyd*, 1 N. J. Eq. 58; *Stoppelbein v. Shulte*, 1 Hill (S. C.) 200; *Heth v. Cocke*, 1 Rand. 344; *McIver v. Cherry*, 8 Humph. 713; *McArthur v. Franklin*, 15 Ohio St. 508; s.c., 16 *Id.* 193; *Whitehead v. Middleton*, 2 How. (Miss.) 692; *Taylor v. Fowler*, 18 Ohio, 567; *Taylor v. McCrackin*, 2 Blackf. 262; *Mayburg v. Brien*, 15 Pet. 38. If the mortgage is foreclosed, her right of dower is defeated. *Stow v. Tift*, 15 Johns. 458; *Frost v. Peacock*, 4 Edw. Ch. 678; *Reed v. Morrison*, 12 Serg. & R. 18. On the other hand, if the mortgage is satisfied by one who is under a primary liability to pay it off, the dower right attaches to the property free from the mortgage; but if the heir or purchaser pays the mortgage to prevent foreclosure, in order that the widow may claim a proportionate benefit from the satisfaction of the mortgage, she must contribute her share towards the expenses. *Hatch v. Palmer*, 58 Me. 292; *Simonton v. Gray*, 34 Me. 50; *Hinds v. Ballou*, 44 N. H. 619; *Ballard v. Bowers*, 10 N. H. 500; *McCade v. Swap*, 14 Allen, 118; *Toomey v. McLean*, 105 Mass. 122; *Wedge v. Moore*, 6 Cush. 8; *Collins v. Torrey*, 7 Johns. 278; *Coates v. Cheever*, 1 Cow. 400; *Hitchcock v. Harrington*, 6 Johns. 290; *Mathewson v. Smith*, 1 R. I. 22; *Klinck v. Keckley*, 2 Hill Ch. 250; *Carter v. Goodin*, 3 Ohio St. 75; *Bank of Commerce v. Owens*, 31 Md. 320; 1 Am. Rep. 60. See *post*, sect. III., ch. X. Where the dower right is subject to the mortgage, and the mortgagee is in possession, the action for dower cannot be instituted until the mortgage has been redeemed. A suit for redemption must precede the assignment of dower. *Smith v. Eustis*, 7 Me. 41; *Richardson v. Skolfield*, 45 Me. 386; *Cass v. Martin*, 6 N. H. 25; *Van Dyne v. Thayer*, 14 Wend. 233.

¹ 4 Kent's Com. 43, 46; *Coster v. Clarke*, 4 Edw. Ch. 428; *Prescott v. Walker*, 16 N. H. 343; *Hopkinson v. Dumas*, 42 N. H. 303; *Howell v. Monson*, 3 Mass. 364; *Brooks v. Everett*, 13 Allen, 458; *Dean v. Mitchell*, 4 J. J. Marsh. 457; *Cooper v. Whitney*, 3 Hill, 97; *Cowman v. Hall*, 8 Gill & J. 398; *Bartlett v. Gouge*, 5 B. Mon. 152; *Robison v. Codman*, 1 Sumn. 129.

This is true both in law and equity, under the common law, as well as the modern lien, theory of mortgages.¹

§ 120. **Dower in proceeds of sale.** — Whenever it is necessary for the settlement of varied interests in lands, of which she is dowable, that they should be sold, her dower right will follow and attach to the proceeds of the sale, to which her husband would have been entitled. This is generally true, for whatever cause the land might have been sold.²

§ 121. **Seisin required in the husband during coverture.** — In order that the dower can attach, the husband must be seised of an estate of inheritance during coverture. But for this purpose it is not necessary that the husband should have the actual corporeal seisin. Seisin in law, with a present right to actual seisin would be sufficient.³ But disseisin, resulting from adverse possession or any other cause beginning before, and continuing during, coverture will prevent dower from attaching. The dower can only take effect when the seisin has been recovered by the husband during coverture.⁴ A mere right of entry, as in the

¹ 4 Kent's Com. 43; 1 Washb. on Real Prop. 204; *Foster v. Dwinel*, 49 Me. 44; *Crittenden v. Johnson*, 6 Eng. (Ark.) 44.

² *Jennison v. Hapgood*, 14 Pick. 345; *Van Vronker v. Eastman*, 7 Metc. 157; *Hawley v. Bradford*, 9 Paige, 200; *Titus v. Neilson*, 5 Johns. Ch. 452; *Church v. Church*, 3 Sandf. Ch. 434; *Smith v. Jackson*, 3 Edw. Ch. 28; *Queen Anne's Co. v. Pratt*, 10 Md. 3; *Bank of Commerce v. Owens*, 31 Md. 320; *s. c.*, 1 Am. Rep. 60; *Keith v. Trapier*, 1 Bailey Eq. 63; *Pifer v. Ward*, 8 Blackf. 252; *Hartshorne v. Hartshorne*, 2 N. J. Eq. 349; *Nazereth Inst. v. Lowe*, 1 B. Mon. 257; *Willett v. Beatty*, 12 B. Mon. 172; *Crane v. Palmer*, 8 Blackf. 120; *Beavers v. Smith*, 11 Ala. 33; *Chaney v. Chaney*, 38 Ala. 35; *Shaeffer v. Ward*, 5 Ill. 511; *Bonner v. Peterson*, 44 Ill. 253; *Barnes v. Gay*, 7 Iowa, 26; *Thompson v. Cochran*, 7 Humph. 72; *Williams v. Woods*, Humph. 403. But see *Newhall v. Five Cents Savings Bank*, 101 Mass. 428; 3 Am. Rep. 387.

³ 2 Bla. Com. 129, 131; Co. Lit. 31 a; *Mann v. Edson*, 39 Me. 25; *Atwood v. Atwood*, 22 Pick. 233; *Dunham v. Osborne*, 1 Paige, 635; *Thompson v. Thompson*, 10 Ired. 133.

⁴ 1 Washb. on Real Prop. 216; *Small v. Proctor*, 15 Mass. 495; *Thompson v. Thompson*, 1 Jones (N. C.), 431.

case of the breach of the condition in an estate upon condition, is not sufficient.¹

§ 122. **Continued—Defeasible or determinable seisin.**— Possession by the husband of the premises is *prima facie* evidence of lawful seisin, although it may be defeasible. As long as possession is retained and except as against the true owner, the widow is entitled to dower in the same manner as if the seisin had been lawful and indefeasible. And the rule is the same with qualified or determinable fees. The widow's dower attaches, and is destroyed only by the determination of the fee in the hands of the husband or his assigns.² Nor, in the case of an unlawful or defeasible seisin, can the wife's claim for dower be resisted by the claim of the husband's grantee that he had no lawful seisin, unless the same defence could be raised by the same parties against the husband.³

§ 123. **Duration of the seisin.**— No length of time is required for the seisin to be in the husband, in order that the wife's right of dower may attach, provided it is in him

¹ *Thompson v. Thompson*, 1 Jones (N. C.), 431; 1 Washb. on Real Prop. 216.

² 1 Washb. on Real Prop. 218; Co. Lit. 241, note 4; *Lewis v. Meserve*, 61 Me. 374; *Mann v. Edson*, 39 Me. 25; *Knight v. Mains*, 12 Me. 41; *Moore v. Esty*, 5 N. H. 479; *Carpenter v. Weeks*, 2 Hill, 341; *Griggs v. Smith*, 12 N. J. L. 22; *Jackson v. Kip*, 8 N. J. L. 241; *Reid v. Stevenson*, 3 Rich. L. 66; *Forrest v. Tremmell*, 1 Bailey, 77; *Thompson v. Thompson*, 1 Jones (N. C.), 431; *Torrence v. Carbey*, 27 Miss. 697; *Firestone v. Firestone*, 2 Ohio St. 415.

³ *Kimball v. Kimball*, 2 Me. 226; *Bolster v. Cushman*, 34 Me. 428; *Hitchcock v. Carpenter*, 9 Johns. 344; *Bancroft v. White*, 1 Caines, 185; *Ward v. Fuller*, 15 Pick. 185; *Osterhout v. Shoemaker*, 3 Hill, 419; *Hitchcock v. Harrington*, 6 Johns. 290; *Hale v. Munn*, 4 Gray, 132; *Bowne v. Potter*, 17 Wend. 164; *Thompson v. Boyd*, 2 N. J. L. 543; *Moore v. Esty*, 5 N. H. 479; *Gammon v. Freeman*, 31 Me. 243; *Wedge v. Moore*, 6 Cush. 8; *Pledger v. Ellerbe*, 6 Rich. L. 266; *Gale v. Price*, 5 Rich. 525; *Griffith v. Griffith*, 5 Harr. 5; *Montgomery v. Bruere*, 5 N. J. L. 265; *Hugley v. Gregg*, 4 Dana, 68; *May v. Tillman*, 1 Mich. 262; *Crittenden v. Woodruff*, 6 Eng. (Ark.) 82; *Taylor's Case*, 9 Johns. 293; *Douglas v. Dickson*, 11 Rich. L. 417; *Stimpson v. Thomas-ton Bk.*, 28 Me. 259.

for his own use and benefit. The vesting of the seisin in law in him for an instant of time is sufficient.¹

§ 124. **Instantaneous seisin.** — But if the seisin in the husband is instantaneous, and it was not intended that he should acquire the beneficial interest therein, and he serves only as a means of passing the seisin to another, the wife will not be entitled to dower. Not the duration, but the character and purposes, of the seisin determine the wife's right of dower therein. It, therefore, does not matter whether the transactions, which effect a conveyance of the seisin through the husband, are instantaneous, or are separate in point of time of execution, provided the subsequent conveyance out of the husband is in pursuance of an agreement forming a part of the original transaction; in both cases the wife will not have dower.² The most common instance of instantaneous seisin, without attachment of dower thereto, is a conveyance of lands to the husband with a mortgage for purchase-money to the grantor, executed at the same time, or subsequently in pursuance of a contemporaneous agreement.³

¹ 2 Bla. Com. 132; 1 Washb. on Real Prop. 218, 219; *Broughton v. Randall*, Cro. Eliz. 503; *Gage v. Ward*, 25 Me. 101; *McCauley v. Grimes*, 2 Gill & J. 318; *Douglass v. Dickson*, 11 Rich. L. 417; *McClure v. Harris*, 12 B. Mon. 261.

² 2 Bla. Com. 132; 1 Washb. on Real Prop. 219, 223; *Maybury v. Brien*, 15 Pet. 39; *Gage v. Ward*, 25 Me. 101; *Moore v. Rollins*, 45 Me. 494; *Hazleton v. Lesure*, 9 Allen, 24; *Clark v. Munroe*, 14 Mass. 351; *King v. Stetson*, 11 Allen, 408; *Bullard v. Bowers*, 10 N. H. 500; *Hinds v. Ballou*, 44 N. H. 620; *Stow v. Tift*, 15 Johns. 462; *Kittle v. Van Dyck*, 1 Sandf. Ch. 76; *McCauley v. Grimes*, 2 Gill & J. 318; *Wooldridge v. Wilkins*, 3 How. (Miss.) 369; *Mills v. Van Voorhis*, 23 Barb. 135; *Griggs v. Smith*, 12 N. J. L. 22; *Wheatley v. Calhoun*, 12 Leigh, 262; *Reed v. Morrison*, 12 Serg. & R. 18; *Dimond v. Billingslea*, 2 Har. & G. 264; *Klinck v. Keckeley*, 2 Hill Ch. 250; *Boynton v. Sawyer*, 35 Ala. 497; *Stevens v. Smith*, 4 J. J. Marsh. 64; *Gully v. Ray*, 18 B. Mon. 107; *Stephens v. Sherrod*, 6 Texas, 297; *Lassen v. Vance*, 8 Cal. 274.

³ *Bullard v. Bowers*, 10 N. H. 500; *Moore v. Rollins*, 45 Me. 493; *Young v. Tarbell*, 37 Me. 509; *Strong v. Converse*, 8 Allen, 559; *Holbrook v. Finney*, 4 Mass. 566; *Hinds v. Ballou*, 44 N. H. 620; *Stow v. Tift*, 15 Johns. 458; *Mills v. Van Voorhis*, 23 Barb. 125; *Reed v. Morrison*, 12 Serg. & R. 18;

§ 125. **Marriage must be legal.**—Like estates by the curtesy, the wife has dower only when the marriage is a legal one. If the marriage is absolutely void, she has no claim for dower; but if it is only voidable, she has dower, unless the marriage has been declared void during the lifetime of the husband.¹

§ 126. **How dower may be lost or barred—By act of the husband.**—At common law the husband could not, by any act during coverture, defeat the wife's right of dower, or prevent its attachment to the property by having inserted in the deed to himself a clause, to the effect that the land should be held by him free from the claim of dower.² But an exception was made in equity in respect to the equitable interest the husband, as vendee under the theory of implied trusts, acquires in the land under the contract of sale, and before the delivery of the deed; whereby a release of his right to specific performance will bar her right of dower therein.³ And in a number of the States it is now provided

Bogie v. Rutledge, 1 Bay, 312; *Henagan v. Harlee*, 10 Rich. Eq. 285; *Chase's Case*, 1 Bland, 206; *McClure v. Harris*, 12 B. Mon. 261; *Klinck v. Keckelely*, 2 Hill Ch. 250. And in the same manner, in those States where the vendor's lien for the purchase-money is recognized, the widow of the purchaser takes her dower subject to the lien. *Hugunin v. Cochrane*, 51 Ill. 302; 2 Am. Rep. 303; *Warner v. Van Alstyne*, 3 Pairé, 513; *Ellicott v. Welch*, 2 Bland, 242; *Miller v. Stump*, 3 Gill, 304; *Barnes v. Gay*, 7 Iowa, 26; *McClure v. Harris*, 12 B. Mon. 261; *Crane v. Palmer*, 8 Blackf. 120; *Thompson v. Cochrane*, 7 Humph. 72.

¹ 2 Bla. Com. 130; Co. Lit. 33 a; *Bishop's Mar. & Div.*, sect. 177. See *Jenkins v. Jenkins*, 2 Dana, 102; *Donnelly v. Donnelly*, 8 B. Mon. 113; *Higgins v. Breen*, 9 Mo 497.

² 1 Washb. on Real Prop. 244, 255; *Swaine v. Perine*, 5 Johns. Ch. 482; *Norwood v. Marrow*, 4 Dev. & B. 442; *Runke v. Hanna*, 6 Ind. 20. And not even will the destruction of the deed before recording defeat the wife's dower in the estate, as against those who have notice. *Johnson v. Miller*, 40 Ind. 376; 17 Am. Rep. 699.

³ *Herron v. Williamson*, Litt. Sel. Cas. 250; 1 Washb. on Real Prop. 224, 225. And this is also the case, where the husband causes the deed to be made to a third party instead of himself. *Lobdell v. Hayes*, 4 Allen, 187; *Steele v. Magie*, 43 Ill. 396; *Heed v. Ford*, 16 B. Mon. 114; *Gully v. Ray*, 18 B. Mon. 107; *Welsh v. Buckings*, 9 Ohio St. 331; *Blakely v. Ferguson*, 20 Ark. 547.

by statute that the widow shall be dowable only in the lands of which her husband dies seised. Under these statutes a *bona fide* conveyance by the husband during coverture will defeat his wife's dower, as effectually, as under similar statutes the wife may by conveyance during coverture defeat the husband's right of curtesy.¹

§ 127. Continued — By wife's release during coverture. — The wife has, however, always had the power to bar her right of dower by joining with her husband in the conveyance of the land. Formerly, in England, it was barred by means of fines and recoveries.² But now, in England, and in this country generally, it is regulated by statute, and by joining in the deed of the husband in the manner prescribed by statute, she may release her dower. The requisites of the deed and of her acknowledgment of its execution vary with the terms of each statute.³ But what-

But if the contract of sale has been performed by the husband, and nothing more is to be done than to execute and deliver the deed, and the husband then dies, as has been already stated, the widow has dower in the premises, and can enforce it against the vendor. See *ante*, sect. 117, note.

¹ *Jenny v. Jenny*, 24 Vt. 324; *McGee v. McGee*, 4 Ired. 105; *Brewer v. Connell*, 11 Humph. 500; 1 Washb. on Real Prop. 268, note.

² 1 Washb. on Real Prop. 245; 2 Bla. Com. 137.

³ *Williams on Real Prop.* 230, 452; 1 Washb. on Real Prop. 245, 249. The wife must be of age. *Adams v. Palmer*, 51 Me. 488; *Cunningham v. Knight*, 1 Barb. 399; *Priest v. Cummings*, 16 Wend. 617; *s. c.*, 20 Wend. 338; *Thomas v. Gammel*, 6 Leigh, 9; *Jones v. Todd*, 2 J. J. Marsh. 359; *Cason v. Hubbard*, 38 Miss. 46; *Lyon v. Kain*, 35 Ill. 370; *Hoyt v. Swar*, 53 Ill. 139; *Hughes v. Watson*, 10 Ohio, 127. Generally she must renounce the dower in the same deed in which her husband conveys the land. *Shaw v. Russ*, 14 Me. 432; *Powell v. Monson*, 2 Mass. 353; *Ulp v. Campbell*, 19 Pa. St. 361; *Davis v. Bartholomew*, 3 Ind. 485; *Williams v. Robson*, 6 Ohio St. 514; *Moore v. Tisdale*, 5 B. Mon. 352. Execution of the deed by the husband's attorney, with the wife, is sufficient. *Fowler v. Shearer*, 7 Mass. 14; *Glenn v. Bank of United States*, 8 Ohio, 72. The deed of renunciation must also be sealed. *Manning v. Laboree*, 33 Me. 343; *Keeler v. Tatnell*, 3 N. J. 62. And where the defect in the acknowledgment of the renunciation of dower does not appear upon the deed, the deed cannot be avoided for that purpose, after the land has passed to a subsequent purchaser without notice. *Shivers v. Simmons*, 54 Miss. 530; 23 Am. Rev. 372. So, also, where the renunciation has been obtained through the fraud or undue influence of the husband, it

ever might be the statutory requirements, they must be strictly complied with, otherwise the dower still exists.¹ And since the dower is extinguished by a release in conjunction with the husband's deed, and operates as an estoppel rather than as a grant, the dower is only extinguished as against those who claim the land under the deed. If, therefore, the deed is void for some cause, whether it be fraud, accident, or mistake, as where the husband's act is void as against his creditors, her dower right would be revived and could be enforced against all other parties.² But the wife can only release her dower to her husband's grantee. She cannot by any independent act release her right during coverture to a stranger laying claim to the land, or to her husband.³

§ 128. Continued — By elopement and divorce. — Un-

cannot be avoided, unless the purchaser had actual or constructive notice of it. *White v. Graves*, 107 Mass. 325; 9 Am. Rep. 38; *Singer Mfg. Co. v. Rook*, 84 Pa. St. 442; 24 Am. Rep. 204; *Kerr v. Russell*, 69 Ill. 666; 18 Am. Rep. 634. And a mistake in the certificate of acknowledgment cannot be subsequently amended, unless the mistake relates to an unimportant fact. *Angier v. Shieffelin*, 72 Pa. St. 106; 13 Am. Rep. 659; *Merritt v. Yates*, 71 Ill. 636; 22 Am. Rep. 128.

¹ *Elwood v. Klock*, 13 Barb. 50; *Kirk v. Dean*, 2 Binn. 341; *Lewis v. Coxe*, 5 Harr. 402; *Grove v. Todd*, 41 Md. 633; 20 Am. Rep. 76; *Scanlan v. Turner*, 1 Bailey, 421; *Rogers v. Woody*, 23 Mo. 548; *Clark v. Redman*, 1 Blackf. 379. In Texas, it is held that a substantial compliance with the requirements of the statute is sufficient. *Belcher v. Weaver*, 46 Texas, 293; *s. c.*, 26 Am. Rep. 267. See also *Morris v. Sargent*, 18 Iowa, 99.

² *Harsiman v. Gray*, 49 Me. 537; *Richardson v. Wyman*, 62 Me. 280; 16 Am. Rep. 459; *Robinson v. Bates*, 3 Metc. 40; *Stinson v. Sumner*, 9 Mass. 143; *Moore v. New York*, 8 N. Y. 110; *Manhattan Co. v. Evertson*, 6 Paige, 457; *Malloney v. Horan*, 49 N. Y. 111; 10 Am. Rep. 355; *Ridgway v. Masting*, 23 Ohio St. 294; 13 Am. Rep. 251; *Woodworth v. Paige*, 5 Ohio St. 70; *Pinson v. Williams*, 23 Miss. 64. But in Illinois it was held, that if the deed is avoided by not being properly recorded, she could not reclaim her dower. *Morton v. Noble*, 57 Ill. 176; 11 Am. Rep. 7. It is doubtful if this may be accepted as a universally recognized exception. From the rule laid down in the text, which is fully supported by the cases cited, and by reason, the judgment in the Illinois case should have been in favor of the widow.

³ *Rowe v. Hamilton*, 3 Me. 63; *Vance v. Vance*, 21 Me. 364; *Gibson v. Gibson*, 15 Mass. 106; *Croade v. Ingraham*, 13 Pick. 33; *Carson v. Murray*, 3 Paige, 483; *Martin v. Martin*, 22 Ala. 104.

der the early statute of Westminster, 13 Edw. I., ch. 34, which is generally received in this country as part of the common law, if a wife elopes with another man and commits adultery with him, she is deprived of her dower.¹ The forfeiture is more in the nature of a suspension than an absolute extinguishment, unless such elopement and adultery is followed by a divorce.² If the parties are not subsequently divorced, her dower right is revived, if she returns to her husband and is received by him and accorded a full forgiveness. She has dower in the case of a reconciliation and condonement, not only in the lands which he possessed before her elopement, but also in those which he has acquired and sold subsequently.³ The commission of adultery, while living apart from her husband, whatever may have been the cause of the separation, will also be a bar.⁴ But a separation of some kind must have taken place, in order that her adultery might work a forfeiture of the dower; adultery in her and her husband's house will not be a bar.⁵ It is necessary, to support the claim to dower, that the widow should be the wife of the husband at his decease. If, therefore, they have been divorced, from whatever cause, for his as well as her fault, her

¹ 4 Kent's Com. 53; 1 Washb. on Real Prop. 242, 243, 309, note. See *Elder v. Riel*, 62 Pa. St. 308; 1 Am. Rep. 414; *Stegall v. Stegall*, 2 Brocken, 256; *Walters v. Jordan*, 13 Ired. 361; *Bell v. Nealy*, 1 Bailey, 312; *Lecompte v. Wash*, 9 Mo. 551. In Massachusetts, it has been held that the statute is not recognized. *Lakin v. Lakin*, 2 Allen, 45.

² Divorce is not necessary to bar her dower at common law. 1 Washb. on Real Prop. 242. But by statute it is now provided in some of the States that elopement and adultery without divorce is no bar. *Bryan v. Batchelder*, 6 R. I. 543; *Reynolds v. Reynolds*, 24 Wend. 193; *Pitts v. Pitts*, 52 N. Y. 593; *Rawlins v. Buttel*, 1 Houst. 224. See 1 Washb. on Real Prop. 309, note.

³ Co. Lit. 33 a, note 8; Washb. on Real Prop. 242, 243. But he is not bound to take her back again. *Govier v. Hancock*, 6 T. R. 603.

⁴ 1 Washb. on Real Prop. 243; *Hethrington v. Graham*, 6 Bing. 135; *Coggsell v. Tibbits*, 3 N. H. 41. But she does not lose her dower, if she commits adultery, under the mistaken belief that her prior husband was dead. 1 Washb. on Real Prop. 243; 1 Cruise Dig. 175, 176.

⁵ *Coggsell v. Tibbetts*, 3 N. H. 41; *Elder v. Reed*, 62 Pa. St. 308; 1 Am. Rep. 414.

dower right would be extinguished, unless the statutes of the different States, providing for divorces, contain a saving clause, giving the innocently divorced wife the right to enjoy her dower, as if she was still a wife.¹

§ 129. **Continued — By loss of husband's seisin.** — As a general proposition, dower can be enforced only so far as the lawful seisin of the husband extends at the time when the dower right attaches. She, therefore, acquires dower in his lands, subject to all the defects, conditions, limitations, and incumbrances, which characterize and cover the husband's title. If, therefore, the husband's seisin is defeated, whether by the assertion of a paramount title, the breach of a condition, or the expiration of the limitation, the wife's dower right is also extinguished.² But if the husband's estate is determined and made to shift over to another upon the happening of a contingency, so that the limitation over is a conditional limitation, it has been generally held, although controverted by good authorities, that the wife's dower nevertheless survives and suspends the execution of the limitation over until her death.³ A like exception is

¹ 4 Kent's Com. 54; 2 Bla. Com. 130; Bishop's Mar. & Div., sects. 661, 662, 663; 1 Washb. on Real Prop. 309, note.

² 1 Washb. on Real Prop. 256; Seymour's Case, 10 Rep. 96; Ray v. Pange, 5 B. & Ald. 561; Brown v. Williams, 31 Me. 403; Beardslee v. Beardslee, 5 Barb. 324; Sanford v. McLean, 3 Paige, 117; Mitchell v. Mitchell, 8 Pa. St. 126; Weir v. Tate, 4 Ired. Eq. 264; Bishop v. Boyle, 9 Ind. 169; Northcut v. Whipp, 12 B. Mon. 72; Greene v. Greene, 1 Ohio, 249.

³ Buckworth v. Thirkell, 3 B. & P. 652, note; Moody v. King, 2 Bing. 447; Sammes v. Payne, 1 Leon. 167; Hatfield v. Sneden, 54 N. Y. 285; Evans v. Evans, 9 Pa. St. 190; Milledge v. Lamar, 4 DeSau. 637; Northcut v. Whipp, 12 B. Mon. 72. Chancellor Kent says: "The ablest writers upon property law are against the right of the dowress, when the fee of the husband is determined by executory devise or shifting use." C. J. Gibson in Evans v. Evans, *supra*, says: "Not one of the text writers has hinted at the true solution of the difficulty, except Mr. Preston. All agree that where the husband's fee is determined by recovery, condition, or collateral limitation, the wife's dower determines with it. I have a deferential respect for the opinion of Mr. Butler, who was perhaps the best conveyancer of his day, but I cannot apprehend the reasons of his distinction in the note to Co. Lit. 241 a, between a fee limited to continue to a particular period at its creation, which

recognized universally in favor of the continuance of the wife's dower, where the husband's estate as tenant in tail has been determined by the failure of issue capable of taking.¹

§ 130. **Continued — By estoppel in pais.** — After the death of the husband, the widow may, by acts which are sufficient to work an estoppel in ordinary cases,² bar her right to dower without any formal release. Her acts would have that effect, if they were calculated to mislead and work a fraud upon purchasers.³ But in order that her acts

curtesy or dower may survive, and the devise of a fee simple or a fee tail absolute or conditional, which by subsequent words is made determinable upon some particular event, at the happening of which dower or curtesy will cease." "How to reconcile to any system of reason, technical or natural, the existence of a derivative estate, after the extinction of that from which it was derived, was for him (Butler) to show, and he has not done it. The case of a tenant in tail," says Mr. Preston (3 Prest. Abst. 373), "is an exception arising from an equitable construction of the statute *De Donis*, and the cases of dower of estates determinable by executory devise and springing (shifting) use owe their existence to the circumstance that these limitations are not governed by common law principles." "It was the benign temper of the judges who moulded the limitations of the estates introduced by them, whether original or derivative, so as to relax the severer principles of the common law, and among other things, to preserve curtesy and dower from being barred by a determination of the original estate which could not be prevented." The foregoing opinion of Justice Gibson is more an explanation, *how* the courts arrived at the distinction between conditional limitations and other determinable estates, than a logical and sound argument in favor of it. It is difficult to see why the equity of the tenant in curtesy or dower, over the grantee of the limitation over in a conditional limitation, should be superior to the equity against the heir of the grantor, who takes the property upon the determination of an estate upon limitation, or estate upon condition. But the position of the Pennsylvania court is sustained by the other cases cited. The student is not prepared to understand the refined distinctions here hinted at, until he has mastered the subsequent chapters on Estates upon Condition, Uses and Trusts, Remainders and Executory Devises. A recurrence to this section after a study of the subjects mentioned, is advisable.

¹ 4 Kent's Com. 49; 1 Washb. on Real Prop. 231; *Nortcut v. Whipp*, 12 B. Mon. 73; *Paine's Case*, 8 Rep. 36.

² See *post*, sects. 724, 726.

³ It must be an unequivocal act or declaration. Mere silence is not sufficient, and presence at the sale without giving notice of her right, will not estop her from claiming dower. *Heth v. Cocke*, 1 Rand. 344; *Smith v*

during coverture may operate as an estoppel and bar her dower they must be equivalent in legal effect to one of the different formal modes provided by law for the extinguishment of the dower.¹

§ 131. Continued — By statute of limitations. — Under no circumstances will the wife's *inchoate* right be affected by the adverse possession of the land during the life time of the husband.² And after it has become, by his death, a consummate right in the nature of a *chose in action*, although long adverse possession after the husband's death is proper evidence for the jury to establish a release of the dower right, it is no absolute bar to the action, unless the statute is made expressly to include actions of dower.³

Paysenger, 2 Const. (S. C.) 59; Owen v. Slatter, 26 Ala. 547; Tennent v. Stoney, 1 Rich. Eq. 222. And likewise, her dower is not estopped by a conveyance by her in the capacity of her husband's administratrix, where no mention was made of her dower, unless she covenants to warrant the title, or purports to convey generally her interest as well as his. Shurtz v. Thomas, 8 Pa. St. 359; Usher v. Richardson, 29 Me. 415; Magee v. Mellon, 23 Miss. 585. And dower will not be barred by joining the widow in a suit for specific performance against the heirs on the contract of the husband for the sale of the lands; she need not answer and may afterwards claim her dower. Grady v. McCorkle, 57 Mo. 172; 17 Am. Rep. 672. But parol denials of her claim, or a participation in the proceeds of a judicial sale in a suit, to which she is made a party, will estop her. Dongrey v. Topping, 4 Paige, 94; Reed v. Morrison, 12 Serg. & R. 18; Simpson's Appeal, 8 Pa. St. 199; Gardiner v. Miles, 5 Gill, 94; Wright v. De Groff, 14 Mich. 167; Ellis v. Diddy, 1 Ind. 561; Smiley v. Wright, 2 Ohio, 511.

¹ Martin v. Martin, 22 Ala. 104. And where the wife of the mortgagor releases dower in her husband's conveyance of the equity of redemption, it bars her dower in the entire estate, although she did not join in the execution of the mortgage. Hoogland v. Watt, 2 Sandf. Ch. 148. See Usher v. Richardson, 29 Me. 415.

² Durham v. Angier, 20 Me. 242; Moore v. Frost, 3 N. H. 127.

³ 4 Kent's Com. 70; Parker v. Obear, 7 Metc. 24; Barnard v. Edwards, 4 N. H. 107; Spencer v. Weston, 1 Dev. & B. 213; Guthrie v. Owen, 10 Yerg. 339; 1 Washb. on Real Prop. 267. But in a number of the States there are express statutory provisions in respect to barring dower by lapse of time. See Robie v. Flanders, 33 N. H. 524; Durham v. Angier, 20 Me. 242; Chew v. Farmers' Bank, 2 Md. Ch. 231; Spencer v. Weston, 1 Dev. & B. 213; Wilson v. McLenaghan, 1 McMull. Eq. 35; Chapman v. Schraeder, 10 Ga. 321; Ralls v. Hughes, 1 Dana, 407; Carmichael v. Carmichael, 5 Humph. 96; Ridgway v.

§ 132. **Continued — By exercise of eminent domain.** — It is well settled, that the dower right of the wife or widow is defeated by the exercise of eminent domain over the land, out of which the dower issues. But it is a matter of considerable doubt, whether the right before assignment, during the life of the husband, or after his death, partakes so much of the nature of an interest or estate in the land, as to entitle her to compensation separate from her husband or his heirs and assignees. It has been held that she cannot claim such compensation, but the question cannot be considered as definitely settled.¹

§ 133. **Widow's quarantine.** — Upon the death of the husband, the widow's right of dower becomes consummate, and she is entitled to an immediate assignment of her dower. Until assignment has been made, and for a period of forty days, she was entitled at common law to a residence in the principal mansion house of her husband, provided she did not marry within that time. This right was called her quarantine.² It is generally recognized in the United States; but since it is principally regulated by statute, there is a considerable variation in respect to its duration, and its relation to the right of assignment of dower. The general rule is that dower should be set out to her within the time of her quarantine, and if it is not, she may at the end of that time pursue the different remedies given for the recovery of the dower and its assignment.³

§ 134. **Assignment — Two modes.** — There are two modes of setting out dower respectively called, “of com-

McAlpine, 31 Ala. 464; *Owen v. Peacock*, 33 Ill. 33; *Tattle v. Wilson*, 10 Ohio, 24.

¹ 1 Washb. on Real Prop. 270. See *Moore v. New York*, 4 Sandf. 450; *s. c.*, 8 N. Y. 110; *Gwynne v. Cincinnati*, 3 Ohio, 24.

² Co. Lit. 34 b; 2 Bla. Com. 139.

³ 4 Kent's Com. 63; 1 Washb. on Real Prop. 272, note 277. She can claim her right of quarantine even against her husband's grantee. *Shelton v. Carroll*, 16 Ala. 148; *Phasis v. Leachman*, 20 Ala. 662.

mon right," and "against common right." If it has been assigned *of common right*, and the widow has lost a part or the whole of the land set out to her by the assertion of a paramount title, she is entitled to an assignment *de novo* out of the remainder of the husband's estate, so that the loss by eviction will not fall entirely upon her. And on the other hand, if there is an eviction of the heir, after assignment of dower, he will in like manner be entitled to a new assignment. But if the assignment was "against common right," it is final, and if the share of either widow or tenant of the freehold is subsequently lost by eviction under paramount title, they have no remedy against each other, as in the case of assignment "of common right."¹

§ 135. **Continued — Of common right.** — Dower of common right must, as a general rule, be set out by metes and bounds.² It is not necessary, where the husband died seised, that the widow should receive one-third by metes and bounds of each tract of land. The tenant or sheriff, as the case may be, is vested with considerable discretion in regard to this matter, and if, under all the circumstances surrounding the case, it is advisable or reasonable, the dower might be assigned to her out of one tract altogether, or where the property consists of arable, pasture and other kinds of land, she may be given her dower in one kind to the exclusion of the others.³ But if the lands are held separately by several grantees of the husband, dower must be set out in each parcel.⁴ Where the property is such that the dower

¹ French v. Pratt, 27 Me. 381; Scott v. Hancock, 13 Mass. 162; Jones v. Brewer, 1 Pick. 314; Mantz v. Buchanan, 1 Md. Ch. 202; St. Clair v. Williams, 7 Ohio, 110; Singleton v. Singleton, 5 Dana, 87; Holloman v. Holloman, 5 Smed. & M. 559.

² Co. Lit. 34 b, note 213; 1 Washb. on Real Prop. 273; Pierce v. Williams, 3 N. J. L. 521.

³ 1 Washb. on Real Prop. 286; White v. Story, 2 Hill, 543; Jones v. Jones, Busbee (N. C.), 177.

⁴ Co. Lit. 35 a; Doe v. Gwinnell, 1 Q. B. 423; Coulter v. Holland, 2 Harr. 330; Cook v. Fisk, Walk. 423.

cannot, without loss, be set out by metes and bounds, it is then permitted that a certain share in the income or occupation and enjoyment of the land should be set apart for her, while the property is held by her in common with the tenant of the freehold.¹ In making the assignment, the extent of her one-third interest in the land is determined by the market and productive value, instead of the mere quantity of land. She is entitled to that part of the estate which would yield her one-third of the rents and profits received from the entire estate.² If the land is held by the heir or devisee, the value of the land or income is estimated at the time when the dower is assigned, thus giving her the benefit of any increase, including any improvements by the heir, as well as subjecting her to the loss by any natural depreciation in the value of the land after the death of her husband.³ If the depreciation is the result of a wilful waste by the heir, she has her right of action for damages against him; but it does not affect or alter the manner of assignment.⁴ If the land is held by alienees of the husband, the English rule, which is followed by the courts of some of the States, is that the value must be estimated according to the condition of the estate at the death of the husband.⁵

¹ 1 Washb. on Real Prop. 286, 287; *Stoughton v. Leigh*, 1 Tannt. 402; *Stevens v. Stevens*, 3 Dana, 371. And where the property consists of mines, dower may be assigned by a parol agreement to divide the profits, and to give her one-third of them. *Billings v. Taylor*, 10 Pick. 460; *Coates v. Cheever*, 1 Cow. 478; *Lenfers v. Henke*, 37 Ill. 405; 24 Am. Rep. 263.

² *Leonard v. Leonard*, 6 Mass. 533; *Coates v. Cheever*, 1 Cow. 476; *McDaniel v. McDaniel*, 3 Ired. 61; *Smith v. Smith*, 5 Dana, 179.

³ *Powell v. Monson*, 3 Mason, 368; *Parker v. Parker*, 17 Pick. 236; *Cattin v. Ware*, 9 Mass. 209; *Davis v. Walker*, 42 N. H. 482; *Thompson v. Morrow*, 5 Serg. & R. 290; *Williams on Real Prop.* 233; 1 Washb. on Real Prop. 288 Co. Lit. 32 a.

⁴ 1 Washb. on Real Prop. 288. See *Powell v. Monson*, 3 Mason, 368; *Campbell v. Murphy*, 2 Jones Eq. 362.

⁵ *Doe v. Gwinnell*, 1 Q. B. 682; *Campbell v. Murphy*, 2 Jones Eq. 357. In New York and Virginia, the value of the land at the time of alienation is the true basis of estimating the value of the dower right. *Walker v. Schuyler*, 10 Wend. 480; *Tod v. Baylor*, 4 Leigh. 498; *Van Gelder v. Post*, 2 Edw. 577. In the earlier decisions, the courts of New York followed the English rule.

The general rule in this country is that the dower must be adjudged according to the value of the land at the time of assignment, less any increase of value arising from improvements made by the alienee, thus giving the widow the benefit of the increase produced by the general and natural rise in the value of the property.¹ A further requisite in the assignment "of common right" is, that the estate set out to her must be absolute for life, and free from conditions and exceptions.²

§ 136. **Dower — Against common right.**—In the assignment of dower, however, it is not necessary that it should be set out in the manner above described. Any other mode of assignment may be adopted by agreement of the parties, and that agreement will effectually bar all claims to dower "of common right," if properly and legally executed; but the practice is for the widow to give a release under seal of her dower right.³

Humphrey v. Pinney, 2 Johns. 484; *Shaw v. White*, 13 Johns. 484. In *Hade v. James*, 6 Johns. Ch. 258, and *Barney v. Frowner*, 9 Ala. 901, the question is left an open one. But see *Marble v. Lewis*, 36 How. Pr. 343. When there is a change in the law after the husband's alienation, the widow's dower in respect to the aliened lands is governed by the law as it existed at the time of alienation. *McCafferty v. McCafferty*, 8 Blackf. 218; *Cowly v. Strader*, 1 Ind. 134; *Moore v. Kent*, 37 Iowa, 20; *s. c.*, 18 Am. Rep. 1; *Kennerly v. Missouri Ins. Co.*, 11 Mo. 204.

¹ *Powell v. Monson*, 3 Mason, 365; *Boyd v. Carlton*, 69 Me. 20; 31 Am. Rep. 268; *Carter v. Parker*, 28 Me. 509; *Gore v. Brazier*, 3 Mass. 544; *Leggett v. Steele*, 4 Wash. C. Ct. 305; *Thompson v. Morrow*, 5 Serg. & R. 289; *Shirley v. Shirley*, 5 Watts, 328; *Bowie v. Berry*, 3 Md. Ch. 359; *Rawlins v. Buttel*, 1 Houst. 224; *Green v. Tennant*, 2 Harr. 336; *Dunseth v. Bank of United States*, 6 Ohio, 76; *Summers v. Babb*, 13 Ill. 483; *Johnson v. Van Dyke*, 9 Ala. 422; *Smith v. Addleman*, 5 Blackf. 406; *Larrowe v. Beam*, 10 Ohio, 498; *Woodbridge v. Wilkins*, 3 How. (Miss.) 360; *Taylor v. Broderick*, 1 Dana, 348. And if the alienee has, during the life time of the husband diminished the value of the land by his mismanagement, the widow is without remedy. *Powell v. Monson*, 3 Mason, 368; *Thompson v. Morrow*, 5 Serg. & R. 290; *McClanahan v. Porter*, 10 Mo. 746.

² Co. Lit. 34 b, note 217; 1 Washb. on Real Prop. 274.

³ 1 Washb. on Real Prop. 273, 274; Co. Lit. 34 b; *Vernon's Case*, 4 Rep. 1; *Conant v. Little*, 1 Pick. 189; *Jones v. Brewer*, *Id.* 314.

§ 137. **By whom may dower be assigned.**—The tenant of the freehold is the only person who is entitled to make the assignment. A disseisor may do it, and if the assignment is made strictly “of common right,” it is binding upon the rightful owner.¹ If the tenant be a minor, his assignment is subject to revision on his arrival at his majority, unless he is under guardianship, and his guardian makes the assignment, when it will be binding upon him.² Where the land is held by two or more jointly, either may set out the dower.³

§ 138. **Remedies for recovery of dower.**—If the dower is not assigned within the time appointed by the law for the continuance of the widow’s quarantine, she can compel the assignment by a resort to the courts. As a general rule, controlled in each State by statutory enactments, there are three remedies for the recovery of dower: 1. The common-law action of dower. 2. A similar action in equity. 3. A summary proceeding in courts of probate, usually confined to claims of dower against the heirs and devisees of the husband.⁴ The most effective remedy is the action in

¹ Co. Lit. 35 a; *Stoughton v. Leigh*, 1 Taunt. 402; 1 Washb. on Real Prop. 274.

² 2 Bla. Com. 136; *Young v. Tarbell*, 37 Me. 509; *Curtis v. Hobart*, 41 Me. 230; *Jones v. Brewer*, 1 Pick. 314; *McCormick v. Taylor*, 2 Ind. 336; *Boyers v. Newbanks*, *Id.* 388. In Illinois, the assignment may be revised by the infant tenant of the freehold, although it was set out by the guardian. See *Bonner v. Peterson*, 44 Ill. 260.

³ Co. Lit. 35 a; 1 Washb. on Real Prop. 275.

⁴ Where it has not been changed by statute, courts of law and equity have concurrent jurisdiction in respect to dower, and the rules governing assignments are alike in both courts. *Herbert v. Wren*, 7 Cranch, 376; *Maybury v. Brien*, 15 Pet. 21; *Badgley v. Bruce*, 4 Paige, 98; *Kiddall v. Trimbell*, 1 Md. Ch. 143; *Hartshorne v. Hartshorne*, 2 N. J. Eq. 349; *Wells v. Beall*, 2 Gill & J. 468; *Blunt v. Gee*, 5 Call, 481; *Campbell v. Murphy*, 2 Jones Eq. 357; *Potier v. Barclay*, 15 Ala. 439; *Osborne v. Horine*, 17 Ill. 92. The remedy in the Probate Court is generally confined to cases of dower, which arise between the widow and the heir or devisee. As a rule, this remedy cannot be resorted to in a case of dower against the husband’s alienee. *French v. Crosby*, 23 Me. 276; *Sheaffe v. O’Neill*, 9 Mass. 9; *Raynham v. Wilmarth*, 13

equity, in that it includes within its jurisdiction actions upon equitable as well as legal dower, while the common-law remedy is confined to legal dower. For further particulars, reference must be made to the statutes of the States.

§ 139. **Demand necessary.**—In some States it is required by statute that a demand should be made by the heir or tenant before commencing the action; and, generally, when damages are asked for, a demand is made, whether required by statute or not, in order to fix a time from which the damages begin to run.¹ It is not necessary that the demand should be made in writing, and if it is done by attorney the power may be given by parol.² But if the demand or power of attorney is in writing, the extent of the demand should be made sufficiently clear in the writing, in order that no resort to parol evidence will be necessary.³ The demand must be made of the tenant of the freehold, and, if more than one, it must be made of all of them; and such a demand is good against subsequent purchasers of the tenant.⁴

§ 140. **Against whom and where the action is brought.**—The action must be brought in the county where the land lies; and the right of dower is construed and governed by the law of the place in which it is situated.⁵ The action is

Metc. 414; *Matter of Watkins*, 9 Johns. 246; *Bisland v. Hewitt*, 11 Smed. & M. 164; *Thrasher v. Pinckard*, 23 Ala. 616. In Vermont, the court of probate has exclusive jurisdiction. *Danforth v. Smith*, 23 Vt. 247.

¹ *Young v. Tarbell*, 37 Me. 509; *Stevens v. Reed*, 37 N. H. 49; *Pond v. Johnson*, 9 Gray, 193; *Ford v. Erskine*, 15 Mass. 484; *Jackson v. Churchill*, 7 Cow. 287; *Ellicott v. Mosier*, 7 N. Y. 201; *Hopper v. Hopper*, 2 N. J. 715.

² *Watson v. Watson*, 10 C. B. 3; *Lathrop v. Foster*, 51 Me. 367; *Baker v. Baker*, 4 Me. 67; *Stevens v. Reed*, 37 N. H. 49; *Page v. Page*, 6 Cush. 196.

³ *Haynes v. Powers*, 22 N. H. 590; *Davis v. Walker*, 42 N. H. 482; *Sloan v. Whitman*, 5 Cush. 532; *Atwood v. Atwood*, 22 Pick. 283; *Bear v. Snyder*, 11 Wend. 592.

⁴ *Luce v. Stubbs*, 35 Me. 92; *Barker v. Blake*, 36 Me. 433; *Parker v. Murphy*, 12 Mass. 485; *Burbank v. Day*, 12 Metc. 557; *Watson v. Watson*, 10 C. B. 3.

⁵ 1 Washb. on Real Prop. 280; 2 Kent's Com. 183, note; *Moore v. New York*,

brought only against those who are tenants of the freehold at the beginning of the action, and such is the rule, even though there has been a conveyance after the demand has been made; and, likewise, if the tenant is a disseisor, he is the proper party.¹

§ 141. **Continued — Abatement by death of widow.**—The action for dower is personal, and dies with the widow, and the suit is abated for every purpose, notwithstanding judgment has been rendered, if the assignment and assessment of damages have not been made.²

§ 142. **Judgment — What it contains.**—If the widow is successful in her action, she is given judgment for the recovery and assignment of dower, and, in some places, damages for its detention.³ The judgment is of a twofold character; the right to recovery of her dower, being a common-law right, while the claim for damages rests upon statute. Judgment may be rendered for the assignment of dower, whether the claim for damages has been lost or it still exists; but if the right to dower has been lost, whether it be by the running of the Statute of Limitations, or through abatement by the death of the widow, no damages

8 N. Y. 110; *Lamar v. Scott*, 3 Strobb. 502; *Duncan v. Dick*, Walk. 281. And except where the land has been sold during the life time of the husband, the dower right is determined by the law in force at the death of the husband. *Melizet's Appeal*, 17 Pa. St. 455; *Randall v. Kreiger*, 2 Dill. 447; *Burke v. Barron*, 8 Iowa, 135; *Lucas v. Sawyer*, 17 Iowa, 517. As to lands conveyed by the husband, see *ante*, sect. 135, note.

¹ *Barker v. Blake*, 36 Me. 433; *Manning v. Laboree*, 33 Me. 343; *Otis v. Warren*, 16 Mass. 53; *Ellis v. Ellis*, 4 R. I. 110; *Jones v. Patterson*, 12 Pa. St. 149; *Casporus v. Jones*, 7 Pa. St. 120; *Hurd v. Grant*, 3 Wend. 340; *Ellicott v. Mosier*, 7 N. Y. 201; *Miller v. Beverley*, 1 Hen. & M. 337; *Norwood v. Morrow*, 4 Dev. & B. 442. And where the dower is to be assigned out of several parcels of land, belonging to different persons, unless changed by statute, a separate action must be brought against each of the owners. They cannot be sued jointly. *Fosdick v. Gooding*, 1 Me. 30; *Barney v. Frowner*, 9 Ala. 901.

² *Rowe v. Johnson*, 19 Me. 145; *Atkins v. Yeomans*, 6 Mete. 438; *Sandback v. Quigley*, 8 Watts, 460; *Turney v. Smith*, 14 Ill. 212.

³ 2 Bla. Com. 126; Co. Lit. 32 b; 1 Washb. on Real Prop. 279, 281.

can be recovered by her or her personal representatives.¹

§ 143. **Continued — Damages, when recoverable.** — Damages could not, at common law, be recovered for the detention of the dower lands. They were first granted by the Statute of Merton, which has generally, in this country, either been recognized as the common law or substantially re-enacted with important additions.² In England, under the Statute of Merton, the damages could only be recovered of the heir or abator, and their assigns, not against the alienee of the husband. But in this country, damages are recoverable against the heir from the death of the husband, or the expiration of her quarantine: if it is against a purchaser, they are allowed either from the demand made upon him, or the commencement of the suit, according to the statutory provisions or local laws of each State.³ In New York there is a further restriction, that damages shall not be allowed for more than six years.⁴ The mode of

¹ Co. Lit. 32 b, note 4; *Rowe v. Johnson*, 19 Me. 146; *Tuck v. Fitts*, 18 N. H. 171; *Atkins v. Yeomans*, 6 Metc. 438; *Sharp v. Pettit*, 4 Dall. 212; *Shirtz v. Shirtz*, 5 Watts, 255; *Turney v. Smith*, 14 Ill. 242; *Waters v. Gooch*, 6 J. J. Marsh. 586.

² Co. Lit. 32 b; *Thompson v. Collier*, Yelv. 112; *Embree v. Ellis*, 2 Johns. 119; *Hitchcock v. Harrington*, 6 Johns. 290.

³ In some of the States the English rule still prevails, that she cannot recover from the husband's grantee. *Sharp v. Pettit*, 2 Dall. 212; *Fisher v. Morgan*, 1 N. J. L. 125; *Waters v. Gooch*, 6 J. J. Marsh. 586. In others, no damages are recoverable in any case. *Hayward v. Cuthbert*, 1 McCord, 386; *Bank of United States v. Dunseth*, 10 Ohio, 18. Where the suit is against the heir, damages are allowed from the expiration of her quarantine; but if the heir has conveyed the estate away, damages can be recovered of the vendee from the time of his purchase. *Newbold v. Ridgway*, 1 Harr. 55; *Green v. Tennant*, 2 *Ib.* 336; *Russell v. Austin*, 1 Paige, 192. But see *Seaton v. Jamison*, 7 Watts, 583. The damages are recovered of the heir for the time elapsing between the death of the husband and the conveyance by the heir. *Hazen v. Thurber*, 4 Johns. Ch. 604. Generally, where damages are allowed against the husband's alienee, they run from the demand for assignment. See 1 Washb. on Real Prop. 282, 283; *Sellman v. Bowen*, 8 Gill & J. 50; *Beavers v. Smith*, 11 Ala. 20; *Thrasher v. Tyack*, 15 Wis. 259; *McClanahan v. Porter*, 10 Mo. 746. In Virginia, from the beginning of the action. *Tod v. Baylor*, 4 Leigh, 498.

⁴ *Bell v. New York*, 10 Paige, 70; *Marble v. Lewis*, 36 How. Pr. 337.

computing the damages is the same everywhere, being one-third of the annual rents and profits for the time for which damages are allowed.¹ The damages are assessed by the jury which renders the verdict, if it is an action at law; and if an action in equity, by the court, if assented to, or by a sheriff's jury summoned for the purpose.²

§ 144. **Continued — Assignment after judgment.** — The dower, after judgment has been rendered, may be set out to her by the tenant of the freehold. And a parol assignment, if according to common right, would be binding upon all parties. But if the parties cannot agree, the widow is entitled to an order, or writing, directed to the sheriff and commanding him to set out the dower. He either does this himself, or in some States causes it to be assigned by commissioners, who are appointed for that purpose.³ Whenever dower is awarded by legal process, the assignment must always be made according to "common right," so far as it is possible to do so under the circumstances of the case. Any other mode of assignment would be invalid, unless assented to by the parties.⁴ The sheriff is then required to make a return to the court, and if no objections are raised against the assignment, it is confirmed by order of the court, and becomes binding upon all parties.⁵

¹ 4 Kent's Com. 65; 1 Washb. on Real Prop. 282; *Winder v. Little*, 4 Yeates, 152; *Layton v. Butler*, 4 Harr. 507.

² 1 Washb. on Real Prop. 283.

³ 1 Washb. on Real Prop. 284, 285; Co. Lit. 203 a, note 105; *Manndrell v. Manndrell*, 7 Ves. 567; *Stoughton v. Leigh*, 1 Taunt. 402; *Mansfield v. Pembroke*, 5 Pick. 449; *Parker v. Parker*, 17 Pick. 236; *Benner v. Evans*, 3 Pa. St. 454; *Weir v. Tate*, 4 Ired. Eq. 264.

⁴ 1 Washb. on Real Prop. 273, 285, 286; *Pierce v. Williams*, 3 N. J. L. 521.

⁵ 1 Washb. on Real Prop. 284, 288. And if there is any objection to be made against the assignment, it must be presented at the time, when the return of the sheriff or commissioner comes up for confirmation. *Tilson v. Thompson*, 10 Pick. 359; *Jackson v. Hixon*, 17 Johns. 123; *Chapman v. Schroeder*, 10 Ga. 321

§ 145. **Assignment**—When two or more widows claim dower. — If the land descends from one person to another, both dying before assignment of dower to the widow of the first, the widows of both the successive tenants would have dower in the same land. But since by the assignment of dower, the heir loses the seisin to that part of the land, the widow of the heir would only have dower out of the remaining two-thirds, in conformity with the maxim, *dos de dote peti non debet*. But if the heir survived the ancestor's widow, he would regain the actual seisin to the reversion of the widow's one-third, and his wife's dower right could at once attach.¹ But where dower is claimed by two widows, whose husbands sustained the relation of vendor and vendee in respect to the land, the assignment of dower to the widow of the former would only suspend the dower right of the other widow to that one-third during the life time of the first dowress; and it would revive upon her death, provided the assignment to the elder dowress did not take place before the marriage of the vendee.² But if before assignment, the elder dowress released her right to the tenant of the freehold, it is simply an extinguishment of her right, and conveys nothing to the tenant. The second widow would then be entitled to dower out of the entire estate, as if there had been no superior claim of dower.³

¹ *Hitchens v. Hitchens*, 2 Vern. 405; *Geer v. Hamblin*, 1 Me. 54; *Manning v. Laboree*, 33 Me. 343; *Cook v. Hammond*, 4 Mason, 485; *Elwood v. Klock*, 13 Barb. 50; *Reynolds v. Reynolds*, 5 Paige, 161; *Safford v. Safford*, 7 Paige, 259; *McLeery v. McLeery*, 65 Me. 172; 20 Am. Law Rep. 688; *Robinson v. Miller*, 2 B. Mon. 288.

² *Bastard's Case*, 4 Rep. 122; *Geer v. Hamblin*, 1 Me. 54; *Manning v. Laboree*, 33 Me. 343; *Dunham v. Osborne*, 1 Paige, 634; *Reynolds v. Reynolds*, 5 Paige, 161. See *Bear v. Snyder*, 11 Wend. 592.

³ *Elwood v. Klock*, 13 Barb. 50; *Atwood v. Atwood*, 22 Pick. 283. But see *Leavitt v. Lamprey*, 13 Pick. 382, where the court holds that a release or assignment by the elder dowress to the tenant, after judgment for recovery of her dower has been rendered, will not entitle the second dowress to dower out of the whole property.

§ 146. **Decree of sum of money in lieu of dower.** — In some of the States, it is held competent for the court, where money is assigned instead of dower in the lands, to grant her a gross sum of money instead of an annual share in the income.¹ But the power of the court to do so is limited in other States to cases, where parties have agreed upon that mode of settlement.²

§ 147. **Dower barred by jointure.** — Dower is also barred by jointure, which is a provision made for the wife by the husband out of his property and expressed to be in lieu of dower.³ At common law there were two kinds, *legal* and *equitable*. Legal jointure was a provision, made by way of use, — an equitable estate for life or in fee; an estate for years was not sufficient. It could not be provided for out of the husband's personalty, only out of real property; and if it took the form of an annuity, it had to be made a charge upon land.⁴ If it is expressly stated to be in lieu of dower, a provision of that kind would bar dower even though made by a stranger.⁵ Nor is it necessary that the estate should be equal in value to the dower right, if it is a substantial provision.⁶ At common law legal jointure did not require the assent of the wife or her

¹ As a rule the amount is calculated upon the chances of life. *Simonton v. Gray*, 33 Me. 50; *Jennison v. Hapgood*, 14 Pick. 345; *Goodburn v. Stevens*, 1 Md. Ch. 441; *Brewer v. Vanarsdale*, 5 Dana, 204. In South Carolina the gross sum is arbitrarily computed at one-sixth of the fees. *Wright v. Jennings*, 1 Bailey, 27; *Garland v. Crow*, 2 Bailey, 24.

² *Hebert v. Wren*, 7 Cranch, 370; *Johnnson v. Elliott*, 15 Ala. 112; *Lewis v. James*, 8 Humph. 537.

³ It will not bar the dower, unless the provision is expressly stated to be in lieu of it. *Buckinghamshire v. Drury*, 2 Eden, 72; *Bubier v. Roberts*, 49 Me. 463; *Reed v. Dickermann*, 12 Pick. 149; *Swaine v. Perine*, 5 Johns. Ch. 489; *Couch v. Stratton*, 4 Ves. 391.

⁴ 2 Bla. Com. 137, 138; *Vernon's Case*, 4 Rep. 1; *Caruthers v. Caruthers* 4 Bro. C. C. 500; *Vance v. Vance*, 21 Me. 364; *Hastings v. Dickinson*, 7 Mass. 153; *McCartee v. Teller*, 2 Paige, 562.

⁵ 1 Washb. on Real Prop. 316; 1 Cruise Dig. 195.

⁶ 1 Washb. on Real Prop. 116; *Drury v. Drury*, 2 Eden, 57; *Buckinghamshire v. Drury*, *Id.* 75.

guardian in order to make it binding upon her, provided it was not fraudulent. Her assent only operated to conclude her from setting up the charge of fraud.¹ But the rule in this respect, has been changed in many of the States, and the intended wife is now required to be made a party to the deed.² Equitable jointure, which is now more largely resorted to in this country, instead of being a formal actual provision, is an executory contract for such a provision, of which a court of equity will decree specific performance. The intended wife, or her guardian, if a minor, must assent to the jointure, and with such assent it may issue out of either real or personal property or both, and may assume any form.³ Both legal and equitable jointure, in order to be a complete bar to dower, must be made before marriage. If it is settled upon the wife after marriage, the widow has the right to elect which she shall take, but she is not entitled to both.⁴ Jointures have of late years given way to what are known as marriage settlements, so that they are very rarely met with in actual practice.

§ 148. Continued — By testamentary provision.— If the testator makes provision for his widow in lieu of dower, the widow must elect between that and her dower right. The right of election is a personal one and is not transferable. The provision, if accepted, will be a good bar to dower, though it consists entirely of personalty, thus

¹ Co. Lit. 36 b; 1 Washb. on Real Prop. 316, 317; *Buckinghamshire v. Drury*, 2 Eden, 64; *McCartee v. Teller*, 3 Paige, 556.

² *Vance v. Vance*, 21 Me. 370; *Bubier v. Roberts*, 49 Me. 463; 1 Greenl. Cruise, 195, 200. See also, *Hastings v. Dickinson*, 7 Mass. 155; *Kennedy v. Nedrow*, 1 Dall. 417; *Ambler v. Norton*, 4 Hen. & M. 23.

³ *Drury v. Drury*, 2 Eden, 39-75; *Caruthers v. Caruthers*, 4 Bro. C. C. 500; *Cobert v. Cobert*, 1 Sim. & Stu. 612; *Smith v. Smith*, 5 Ves. 189; *McCartee v. Teller*, 2 Paige, 550; *Shaw v. Boyd*, 5 Serg. & R. 309; *Andrews v. Andrews*, 8 Conn. 79; *Craig v. Walthall*, 14 Gratt. 518; 1 Washb. on Real Prop. 318, 319; *Williams on Real Prop.* 236, Rawle's note.

⁴ *McCartee v. Teller*, 2 Paige, 559; *Drury v. Drury*, 2 Eden, 64; *Swaine v. Perine*, 5 Johns. Ch. 482; 1 Washb. on Real Prop. 317.

excluding her from her share in the realty.¹ If accepted, it not only bars her dower to lands, of which the husband died seised, but also to those which he had aliened during life.² But the intention, that the testamentary provision must be taken *in lieu* of dower, must be made to appear in the terms of the will, either expressly or impliedly, as where the behests of the testator cannot be fully carried out, if dower is claimed together with the provision. If this intention is not established, she might at common law claim both.³ But in a number of the States by statutory enactment a testamentary provision in favor of the wife is presumed to be in lieu of dower, unless the contrary intention is shown.⁴

¹ *Bubier v. Roberts*, 49 Me. 463; *Hubbard v. Hubbard*, 6 Metc. 50; *Pollard v. Pollard*, 1 Allen, 490; *Welch v. Anderson*, 28 Mo. 293. The right of election in such cases cannot be exercised by any one for her. Thus the guardian or committee of an insane widow cannot make the election. *Kennedy v. Johnstone*, 65 Pa. St. 451; 3 Am. Rep. 650.

² *Allen v. Pray*, 12 Me. 138; *Chapin v. Hill*, 1 R. I. 446; *Kennedy v. Mill*, 13 Wend. 553; *Evans v. Pierson*, 9 Rich. 9; *Hornsey v. Casey*, 21 Mo. 545. *Contra*, *Borland v. Nicols*, 12 Pa. St. 38; *Higginbotham v. Cornwell*, 8 Gratt. 83.

³ *Herbert v. Wren*, 7 Cranch, 370; *Allen v. Pray*, 12 Me. 138; *Chapin v. Hill*, 1 R. I. 446; *Bull v. Church*, 5 Hill, 206; *Van Order v. Van Order*, 10 Johns. 30; *Adsit v. Adsit*, 2 Johns. Ch. 448; *Lewis v. Smith*, 9 N. Y. 502; *Kennedy v. Nedrow*, 1 Dall. 418; *Duncan v. Duncan*, 2 Yeates, 302; *Stark v. Hunton*, 1 N. J. Eq. 210; *White v. White*, 16 N. J. L. 202; *Higginbotham v. Cornwell*, 8 Gratt. 83; *Whilden v. Whilden*, Riley, 205; *Pickett v. Peay*, 3 Brev. 545; *Hall v. Hall*, 8 Rich. Eq. 407; *Raines v. Corbin*, 24 Ga. 185; *Tooke v. Hardeman*, 7 Ga. 20; *Green v. Green*, 7 Port. (Ala.) 19; *Hilliard v. Binford*, 10 Ala. 987; *Pemberton v. Pemberton*, 29 Mo. 408; *Corriell v. Ham*, 2 Iowa. 558; *Clark v. Griffith*, 4 Iowa, 405; *Ostrander v. Spickard*, 8 Blackf. 227; *Yancy v. Smith*, 2 Metc. (Ky.) 408.

⁴ See *Herbert v. Wrenomitch*, 7 Cranch, 378; *Bubier v. Roberts*, 49 Me. 464; *Reed v. Dickerman*, 12 Pick. 140; *Smith v. Baldwin*, 2 Ind. 404; *McCans v. Board*, 1 Dana, 40; *Thompson v. Egbert*, 17 N. J. L. 459; *Collins v. Carman*, 5 Md. 504; *Hilliard v. Binford*, 10 Ala. 987. In most of the States, there is also a statutory rule, that if the election is not made within a certain period, usually six months, after the death of the testator, it will be presumed that she has elected to take the testamentary provision. *Hastings v. Clifford*, 32 Me. 132; *Smith v. Smith*, 20 Vt. 270; *Pratt v. Felton*, 4 Cush. 174; *Kennedy v. Mills*, 13 Wend. 556; *Thompson v. Egbert*,

SECTION IV.

HOMESTEAD ESTATES.

- SECTION** 158. History and origin.
159. Nature of the estate.
160. Who may claim homestead.
161. What may be claimed.
162. Exemption from debts.
163. How homestead may be lost — By alienation.
164. Continued — By abandonment.

§ 158. **History and origin.** — These estates are not of common-law origin. They are purely statutory and have been in existence only within the last thirty years. The object of their creation is to provide for the family a homestead, which shall be exempt from a levy under execution for the debts of the owner, and save the community the necessity of supporting such persons. The exemption rests only on public policy, and is not given through any sympathy for the debtor. As these estates are created by statute, and each statute varies in its details, it is impossible to do more than present in a general outline the ordinary

17 N. J. L. 459; *Boone v. Boone*, 3 Har. & McH. 93; *Collins v. Carman*, 5 Md. 504; *Pettijohn v. Beasley*, 1 Dev. & B. 254; *Lewis v. Lewis*, 7 Ired. Eq. 72; *Malone v. Majors*, 8 Humph. 577; *Ex parte Moore*, 1 How. (Miss.) 665; *Hilliard v. Binford*, 10 Ala. 987; *Kemp v. Holland*, 10 Mo. 255. But see *Merrill v. Emery*, 10 Pick. 507, where it is held that if the widow dies during the time prescribed for making the election, she will be presumed to have elected that provision which was most favorable to her.

and usual characteristics of such estates. At present they prevail in almost all of the States of this country.¹

§ 159. **Nature of the estate.** — As a general proposition, though varying somewhat in the different States, the estate is one for the life or lives of those who may claim it, and in most cases the ordinary incidents of life estates would attach to it.² The most general provision is that it shall be for the life of the husband, to the surviving widow for life or during widowhood, and to the children during minority. And when the widow claims it, it is generally granted to her in addition to her dower right. One is not affected by the other.³

§ 160. **Who may claim homestead.** — It is generally provided that any one who can be in any sense denominated the “head of the family,” may claim the homestead for their benefit. Thus, the right may be claimed by the husband, and, after his death, the wife, who generally has

¹ The reader is also referred to Judge Thompson's work on Homesteads and Exemptions. Judge Thompson, in his preface to this treatise, says: “To compile, digest, and reduce to any condition of connection and symmetry near 2,000 decisions, involving the construction of a hundred statutes, similar in their main features, but dissimilar in many details, is like writing a treatise on all the Codes of Europe.” Recognizing the accuracy of this statement, we will present in the present connection only the *main features*, and refer the reader to Judge Thompson's book and the statute of his own State for the details.

² See *Kerley v. Kerley*, 13 Allen, 287; *Abbott v. Abbott*, 97 Mass. 136; *Black v. Curran*, 14 Wall. 403; *McDonald v. Crandall*, 43 Ill. 232; *Burns v. Keas*, 21 Iowa, 257; *Folsom v. Carli*, 5 Minn. 337; *Smith v. Estell*, 34 Miss. 527; *Loeke v. Rowell*, 47 N. H. 49; *Tieman v. Tieman*, 34 Texas, 525; *Howe v. Adams*, 28 Vt. 544; *Jewett v. Brock*, 32 Vt. 65; *Bowman v. Noiton*, 16 Cal. 217; *Thompson on Homest.*, sect. 540.

³ *Chaplin v. Sawyer*, 35 Vt. 290; *Mercier v. Chase*, 11 Allen, 194; *Bates v. Bates*, 97 Mass. 392; *Chisholm v. Chisholm*, 41 Ala. 327; *Merriman v. Lacefield*, 4 Heisk. 222; *Walsh v. Reis*, 50 Ill. 477; *Bresee v. Stiles*, 22 Wis. 120. *Contra*, *McAfee v. Bettis*, 72 N. C. 29; *Singleton v. Huff*, 49 Ga. 584; *Butterfield v. Wicks*, 44 Iowa, 310. See *Thompson on Homest.*, sects. 555-566.

the right to claim it for herself, though she may have no children.¹ But an unmarried person may claim it, if he has living with him unmarried sisters and others who are dependent upon him.²

§ 161. **What may be claimed.** — A homestead, as defined by the courts, is the place where one dwells. It is his residence. And the same rules and principles apply to the homestead, which govern the determination of what is one's domicile.³ In order that the homestead right may be claimed in a lot or parcel of land, it must be shown to be the *bona fide* residence of him and his family. An intention

¹ Nicholas v. Parezell, 21 Iowa, 265; Stilloway v. Brown, 12 Allen, 34; McKenzie v. Murphy, 24 Ark. 155; Davenport v. Alston, 14 Ga. 271; Crane v. Waggoner, 33 Ind. 83; Kitchell v. Burgwin, 21 Ill. 40; Folsom v. Carli, 5 Minn. 337; Morrison v. McDaniel, 30 Miss. 217; Griffin v. Sutherland, 14 Barb. 458; Barney v. Leeds, 51 N. H. 266; Homestead Cases, 31 Texas, 680; Estate of Walley, 11 Nev. 260.

² Marsh v. Lozenby, 41 Ga. 154; Graham v. Crockett, 18 Ind. 119; Whaley v. Cadman, 11 Iowa, 226; Homestead Cases, 31 Texas, 678. The tests which are generally applied to doubtful cases, are: 1. Whether there is a legal or moral duty to support the persons who are claimed to constitute the family; and, 2. Whether such persons are actually dependent upon him. Whaley v. Cadman, 11 Iowa, 226; Salla v. Waters, 17 Ala. 486; Blackwell v. Broughton, 50 Ga. 390; Connaughton v. Sands, 32 Wis. 387; Wade v. Jones, 20 Mo. 75. The cases first cited were where an unmarried man had indigent sisters living with him, who were dependent upon him for support. In the same manner an unmarried woman, supporting the children of a deceased sister, is under the homestead laws the head of a family. Arnold v. Waltz, 53 Iowa, 706; 36 Am. Rep. 248. So also the guardian of a minor. Rountree v. Dennard, 59 Ga. 629; 27 Am. Rep. 235. But an unmarried man, having his brother and brother's wife living with him, is not the "head of a family." Whalen v. Cadman, 11 Iowa, 226. And likewise an unmarried man, having no dependent relatives, keeping house alone with his servants and farm hands, does not constitute the "head of the family." Calhoun v. Williams, 32 Gratt. 18; 34 Am. Rep. 759; Garaty v. Dubose, 5 S. C. 498; Calhoun v. McLendon, 42 Ga. 406.

³ Davis v. Andrews, 30 Vt. 678; Austin v. Stanley, 46 N. H. 51; Barney v. Leeds, 51 N. H. 265; Tomlinson v. Swinney, 22 Ark. 400; Taylor v. Boulware, 17 Texas, 74; Kelly v. Baker, 10 Minn. 156; Bunker v. Locke, 16 Wis. 638; Rogers v. Ragland, 42 Texas, 443.

to make it such will give no right,¹ nor can the claim be made to property worth more than the sum laid down by the statute of the State. When the debtor wishes to claim the homestead, it is necessary that it should in some way be ascertained and set out. Minute details in regard to this matter are in some States prescribed by the statutes,² but the general rule is that the debtor must select the land which he desires for a homestead, keeping within the limit as to value. If the value of the property exceeds the limit, it may be partitioned and set out by appraisers at the instance of creditors, and if it is not divisible, the property may be sold, and the sum allowed by statute will be set apart and in most cases invested by the court in a homestead, while the remainder of the purchase-money will be devoted to the liquidation of his debts.³

§ 162. **Exemption from debt.** — The exemption of the homestead from liability for the debts of the owner is various in its extent, sometimes absolute, referring to all classes of debts, and sometimes more or less limited to particular obligations, depending altogether upon the special provisions of each statute. But, perhaps, the most general rule is, exemption from liability for all debts, except taxes, and such debts which create a lien upon the premises, such

¹ *Elston v. Robinson*, 23 Iowa, 208; *Lee v. Miller*, 11 Allen, 38; *Beecher v. Baldy*, 7 Mich. 488; *Kresin v. Mau*, 15 Minn. 118; *Norris v. Moulton*, 34 N. H. 394; *Smith v. Wells*, 46 Miss. 71; *Cook v. McChristian*, 4 Cal. 24; *Prescott v. Prescott*, 45 Cal. 58; *Tousville v. Pierson*, 39 Ill. 453; *Kitchell v. Burgwin*, 21 Ill. 40; *Christy v. Dyer*, 14 Iowa, 440. The use of a part of the premises for business purposes will not prevent the homestead right from attaching. *Hogan v. Manners*, 23 Kan. 551; 33 Am. Law Rep. 199. But see *Rhodes v. McCormick*, 4 Iowa, 368; *Kurz v. Brusch*, 13 Iowa, 371. But lands and houses rented out cannot be claimed as homestead. *Folsom v. Carli*, 5 Minn. 337; *Kelly v. Baker*, 10 Minn. 154; *Ashton v. Ingle*, 20 Kan. 670; 27 Am. Law Rep. 197.

² See Thompson on Homest., sects. 230, 236.

³ 1 Washb. on Real Prop. 366-380; Thompson on Homest., sects. 230, 236.

as for the purchase-money, or judgment-debts, where such judgment has been obtained prior to the attachment of the homestead.¹

§ 163. **How homestead may be lost — By alienation.** — The attachment of the homestead right does not take away altogether the power of alienation. It is the subject of sale, mortgage, and release, as if no homestead right had existed. But for the complete conveyance of the title and effectual barring of the homestead right, it is generally necessary that the wife should join in the deed of conveyance.² Such alienation conveys the whole title,³ and the proceeds of sale are to be reinvested in a homestead, otherwise they become subject to the claims of creditors.⁴

¹ See Thompson on Homest., sects. 290–388. In this connection it may be stated that the homestead can, under no circumstances, be claimed against debts contracted prior to the passage of the homestead and exemption law. Homestead Cases, 22 Gratt. 266; 12 Am. Rep. 507; *Garrett v. Cheshire*, 69 N. C. 396; 12 Am. Rep. 647; *Gunn v. Barry*, 15 Wall. 610.

² *Poole v. Gerrard*, 6 Cal. 71; *Dearing v. Thomas*, 25 Cal. 224; *Burnside v. Terry*, 45 Ga. 629; *Kitchell v. Burgwin*, 21 Ill. 44; *Slaughter v. Detiney*, 15 Ind. 49; *Babcock v. Hoey*, 11 Iowa, 375; *Dollman v. Harris*, 5 Kan. 598; *Greenough v. Turney*, 11 Gray, 334; *Frisbee v. Muster*, 24 Mich. 452; *Morris v. Moulton*, 34 N. H. 394; *Clark v. Shannon*, 1 Nev. 568; *Re Cross*, 2 Dill. 320; *Lawyer v. Slingerland*, 11 Minn. 457; *Sears v. Hanks*, 14 Ohio St. 298; *Sampson v. Williamson*, 6 Texas, 116.

³ That a conveyance by husband and wife for a valuable consideration will pass their title to the grantee free from the claims of creditors, is established beyond a doubt. *Bowman v. Norton*, 16 Cal. 214; *Deffeliz v. Pico*, 46 Cal. 289; *Bonnell v. Smith*, 53 Cal. 377; *Bliss v. Clark*, 39 Ill. 590; *Lamb v. Shays*, 14 Iowa, 567; *Parker v. Doan*, 45 Miss. 409. But it has been held that the voluntary conveyance to a third person without consideration is an act of abandonment, a fraud upon creditors, and the creditors may attach the property in the hands of the grantee. *Currier v. Sutherland*, 54 N. H. 475; 20 Am. Rep. 143. But see *Dientzer v. Bell*, 11 Wis. 114; *Winebrenner v. Weisinger*, 3 B. Mon. 33; *Dearman v. Dearman*, 4 Ala. 521; *Planters' Bank v. Henderson*, 4 Humph. 75; *Legro v. Lord*, 10 Me. 161; *Vaughan v. Thompson*, 17 Ill. 78; *Foster v. McGregor*, 11 Vt. 595; *Garrison v. Monaghan*, 33 Pa. St. 232.

⁴ *Smith v. Gore*, 23 Kan. 88; 33 Am. Rep. 158.

§ 164. **Continued — By abandonment.**— The homestead may also be lost by acts which constitute an abandonment of the homestead; such would be a permanent removal from the homesteads where actual residence is required to support the right, or the acquisition of a new homestead.¹ For details, reference must be made to the statutes.

¹ *Stewart v. Mackey*, 16 Texas, 58; *Gonhenant v. Cockrell*, 20 Texas, 96; *Dearing v. Thomas*, 25 Ga. 224; *Moore v. Dunning*, 29 Ill. 135; *Kitchen v. Burgwin*, 21 Ill. 40; *Titman v. Moore*, 43 Ill. 169; *Floyd v. Mosier*, 1 Iowa, 513; *Williams v. Swetland*, 10 Iowa, 51; *Woodbury v. Luddy*, 14 Allen, 1; *Howe v. Adams*, 28 Vt. 544. A temporary absence, *animo revertendi*, will not cause an abandonment. *Tomlinson v. Swinney*, 22 Ark. 400; *Holden v. Pinney*, 6 Cal. 234; *Walters v. People*, 18 Ill. 194; *Austin v. Swank*, 9 Ind. 112; *Wood v. Lord*, 51 N. H. 454; *Vetz v. Beard*, 12 Ohio St. 431; *Barker v. Dayton*, 28 Wis. 367.

CHAPTER VII.

ESTATES LESS THAN FREEHOLD.

SECTION I. — *Estates for years.*

II. — *Estates at will, and tenancies from year to year.*

III. — *Estates at sufferance.*

SECTION I.

ESTATES FOR YEARS.

SECTION 171. History of estates for years.

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200. Effect of disclaimer of lessor's title.

201. Letting land upon shares.

§ 171. **History of estates for years.** — Under the feudal system, the smallest interest which could be granted out of lands, having the characteristics of an estate, was a freehold. Such are the estates, which have been treated in the preceding pages. But there obtained at that time a custom of granting by contract to tenants the possession of the lands for a stipulated period, in consideration of some rent paid or service performed by the tenant. The tenant acquired no estate or vested interest in the land, which would give to him the possessory actions necessary for the protection of such interests. If he was evicted by the landlord or by any other person, he had only his action for damages against the landlord for the breach of his contract. He could not recover possession as in the case of a freehold.¹ But subsequently the writ of ejectment was invented for his protection, by which he could recover possession of the land, with damages for its detinue, and this form of action substantially remains to this day.² But these estates, as well as the other tenancies considered in the following sections, are generally considered and treated as chattel interests in lands, having more the characteristics of a bailment, than of a freehold estate in real property. The tenant is never said to be seised of the land. The actual seisin, if acquired by virtue of his possession, is held by him as a *quasi-bailee* of the remainder-man.³ This general proposition is, however, often limited by statutory enactments, which give to estates for years of a certain duration, fixed by statute, all the characteristics of a freehold estate.⁴ Such leaseholds, by force of these statutes, assume the character of a freehold estate, so far as the certainty of its duration will permit.

¹ 1 Washb. on Real Prop. 433, 435; Maine's Anc. Law, 275.

² 1 Washb. on Real Prop. 435, 436; Goodlittle v. Tombs, 3 Wils. 120; Campbell v. Loader, 3 H. & C. 527.

³ 1 Washb. on Real Prop. 435; 1 Cruise Dig. 224.

⁴ 1 Washb. on Real Prop. 463; Walker Am. Law, 279.

§ 172. **Definition.** — An estate for years is one granted for a certain definite period of time, by the owner of the freehold, who in this connection is called the lessor, to one called the lessee, to hold and enjoy during the time stipulated and under the conditions agreed upon. The word *years* is used simply as a unit of time, and an estate for years, technically, may be for any period of time, a month, a week, etc.¹

§ 173. **Term defined.** — Since the estate is to last for a definite period of time, having a precise beginning and end, it has acquired the technical designation of a *term*, from the Latin *terminus*.² But the period need not be definitely fixed by the contract of the parties, which creates the estate. Under the maxim, *id certum est quod certum reddi potest*, the contract or lease would be valid, if it contained sufficient means of ascertaining its duration. A lease, therefore, for so many years as J. S. shall name, or to A. during his minority, would be a good term, while a lease for so many years as A. shall live, would not be good as a term, since there is no way in which the duration of the term can be ascertained until its expiration.³

§ 174. **Interesse termini.** — The lessee does not acquire an estate in the land until he has entered into possession. His interest is simply a right of entry, and is called an *interesse termini*. Until possession is acquired, he cannot maintain any action against strangers in respect to the land.

¹ 1 Washb. on Real Prop. 436; Brown v. Bragg, 22 Ind. 122; Gould v. School Dist., 8 Minn. 431.

² 1 Washb. on Real Prop. 438; Williams on Real Prop. 388.

³ Co. Lit. 45 b; 1 Washb. on Real Prop. 441; Dunn v. Cartright, 4 East, 29; Doe v. Dickson, 9 East, 15; West. Transp. Co. v. Lansing, 49 N. Y. 508; Horner v. Leeds, 25 N. J. L. 106; Delashman v. Barry, 20 Mich. 292. On the principle that the number of years can be ascertained by computation, it has been held that a devise or grant of lands, to pay debts out of the rents and profits, is treated as an estate for years. 1 Cruise Dig. 223; Batchelder v. Dean, 16 N. H. 268.

Before the entry, the right of possession and the right to bring such actions are in the lessor.¹ It has also been held at common law that the lessee cannot, before entry, maintain an action of ejectment. But under the present theory in regard to this action, it is equivalent to common-law entry, and can be maintained by any one who has a good title and an immediate right of entry.² The *interesse termini*, however, is so far a vested interest as to be capable of descent to the personal representatives, or of bequest like other chattel interests. It can also be assigned or released.³ But a delay on the part of the lessee to convert his *interesse termini* into an actual estate, does not suspend his liability on the covenants of his lease, unless such delay is occasioned by the fault of the lessor.⁴

§ 175. **Terms commencing in futuro.** — Since a term of years is a contract for the delivery and detention of the possession, and does not affect the seisin of the reversioner, it may be made to commence at any time in the future, as well as in the present, provided it does not offend the doctrine of perpetuities, by vesting in possession at a time beyond a life or lives in being, and twenty-one years there-

¹ Co. Lit. 46 b; 4 Kent's Com. 97; Doe v. Walker, 5 B. & C. 111; Wheeler v. Montefiore, 2 Q. B. 142; Wood v. Hubbell, 10 N. Y. 487; Sennett v. Bucher, 3 Pa. St. 392; 1 Washb. on Real Prop. 442, 443. And although the words "bargain and sell" in a lease, founded upon actual and valuable consideration, will create a use, which will be executed into a legal estate by the Statute of Uses, the same rule in respect to the necessity of entry into possession applies. 2 Sand. Uses, 56; 1 Washb. on Real Prop. 443. See Harrison v. Blackburn, 17 C. B. (N. S.) 678.

² 1 Washb. on Real Prop. 443, 444; Gardner v. Keteltas, 3 Hill, 332; Whitney v. Allaire, 1 N. Y. 305.

³ Co. Lit. 46 b, 338 a; 4 Kent's Com. 97; Doe v. Walker, 5 B. & C. 111; 1 Washb. on Real Prop. 444.

⁴ 1 Washb. on Real Prop. 445; Salmon v. Smith, 1 Saund. 203, note 1; Whitney v. Allaire, 1 N. Y. 305; Lafarge v. Mansfield, 31 Barb. 345; Mechan. Ins. Co. v. Scott, 2 Hilt. 550; Maverick v. Lewis, 3 McCord, 216.

after.¹ Until it does take effect in possession, the lessee has only an *interesse termini*.²

§ 176. **The rights of lessee for years.** — As a general proposition, the lessee is entitled to all the rights of freeholders, which arise out of actual possession, including those of estovers, fixtures, and the modes of enjoyment of the land.³ But the estate for years can be regulated by agreement of parties to an almost unlimited extent, and the rights of the parties under a lease are as variant as the contracts. There are few if any rights which might be considered as invariable incidents of leaseholds.

§ 177. **How created.** — At common law an estate for years could have been created by a parol contract. But under the English Statute of Frauds, all leases for more than three years must be put in writing and signed by the parties; otherwise, they shall have only the force and effect

¹ Williams on Real Prop. 388; Cadell v. Palmer, 10 Bing. 140; Wild v. Traip, 14 Gray, 333; Whitney v. Allaire, 1 N. Y. 311; Field v. Howell, 6 Ga. 423. Sometimes a lease contains a covenant for renewal. Where it is a covenant for an indefinite renewal, it has been held to be a void agreement within the doctrine of perpetuity. Morrison v. Rossignol, 5 Cal. 64. Whether this rule would be adopted generally, is a matter of some doubt. Where the covenant for renewal is on the part of the lessor, and the lessee does not expressly bind himself to accept such a renewal, the performance or non-performance of the covenant is at the option of the lessee, and he cannot be compelled to accept a renewal. Bruce v. Fulton National Bank, 79 N. Y. 154; 35 Am. Rep. 505.

² 1 Washb. on Real Prop. 439; 4 Kent's Com. 97; Doe v. Walker, 5 B. & C. 311. If the premises, in a lease commencing *in futuro*, are destroyed before the time arrives for it to vest in possession, the tenant is under no liability for rent. The very subject-matter of the contract being destroyed, the contract becomes an impossible one, and the parties are relieved of their liability. Taylor v. Caldwell, 3 B. & S. 826; Wood v. Hubbell, 10 N. Y. 487.

³ Kutter v. Smith, 2 Wall. 497; Davis v. Buffum, 51 Me. 162; Dingley v. Buffum, 57 Me. 382; Preston v. Briggs, 16 Vt. 124; Riddle v. Littlefield, 33 N. H. 510; Freer v. Stotenbur, 33 Barb. 642; Dubois v. Kelly, 10 Barb. 490; Mason v. Fenn, 13 Ill. 529. See *ante*, sects. 69-82.

of estates at will.¹ Although the statutes declare such parol leases to have only the force and effect of estates at will, yet in those States in which the doctrine of tenancies from year to year is recognized, they would be construed to be tenancies from year to year, if the tenant enters into possession and pays rent, and in all the States, such tenants would have a right to the statutory notice to quit before an action of ejectment can be maintained against them.² But it is not necessary that such leases should be under seal.³ The statutes of the different States are similar in their general provisions, but there is a diversity in respect to the length or duration of those leases, which will be valid without writing;⁴ while in some again, the writing is required to be under seal, or in other words to be a deed.⁵ If the lease is executed by an agent, according to the English law, and that of some of the States, the authority must be given in writing, while in other States, the writing

¹ 1 Washb. on Real Prop. 446, 447.

² *Clayton v. Blakeley*, 8 T. R. 3; *Lockwood v. Lockwood*, 22 Conn. 425; *People v. Rickhart*, 8 Cow. 226; *McDowell v. Simpson*, 3 Watts, 129; *Drake v. Newton*, 3 N. J. 111; *Kerr v. Clark*, 19 Mo. 132; *Ridgeley v. Stillwell*, 28 Mo. 400. And as long as possession continues under a parol lease, which is void under the Statute of Frauds, the rights of the parties will be governed by the terms of the original letting. *Doe v. Bell*, 5 T. R. 471; *Barlow v. Wainwright*, 22 Vt. 88; *Currier v. Barker*, 2 Gray, 224.

³ The English statute has been re-enacted in Pennsylvania, New Jersey, Maryland, North Carolina, South Carolina, Georgia, and Indiana. In Florida, leases for two years and under may be by parol. In Alabama, Arkansas, California, Delaware, Iowa, Kentucky, Michigan, Mississippi, New York, Nevada, Rhode Island, Tennessee, Texas, Virginia, and Wisconsin, the term is one year; while in Maine, Massachusetts, Missouri, New Hampshire, Ohio, and Vermont, all parol leases create tenancies at will. 1 Washb. on Real Prop. 484, note.

⁴ *Allen v. Jaquish*, 21 Wend. 635; *Olmstead v. Niles*, 7 N. H. 526; *Den v. Johnson*, 15 N. J. L. 116; 1 Washb. on Real Prop. 447.

⁵ The provisions of the State statutes requiring a sealed instrument in the grant of a leasehold, are not uniform. Generally it is provided that only leases of a certain duration should be sealed. See Taylor's L. & T., sect. 34; *Bratt v. Bratt*, 21 Md. 583; *Chandler v. Kent*, 8 Minn. 526.

not being under seal, a parol power of attorney will be sufficient.¹

§ 178. **Form of instrument.** — In the execution of a lease, a general form of deed, more fully explained hereafter, is usually followed, and certain terms and forms of expression are used. But any form of deed, and any terms or mode of expression will be sufficient for the creation of an estate for years, which show the intention of the lessor to transfer to the lessee the possession of the land during a certain determinate period of time. The words of grant usually employed are “grant,” “demise,” and “farm-let.” “Do lease, demise, and farm-let,” signify generally the creation of a present vesting term, and not a future or contingent one, but this implication may be controlled by the other provisions of the lease.²

§-179. **Continued — Distinction between present lease and contract for future one.** — It is sometimes difficult to determine whether the instrument is a present lease, or only a contract for a future one. If it is a present lease, the parties will be bound by its implied, as well as express, provisions, and their force and effect cannot be altered by parol evidence, showing the intentions of the parties to have been different. Whereas, if the instrument was only a contract for a future lease, it is not the final repository

¹ 1 Washb. on Real Prop. 448, note. The English rule has been adopted in Alabama, Arkansas, Georgia, Maryland, Michigan, Missouri, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, South Carolina, and Wisconsin.

² So. Cong. Meet. *House v. Hilton*, 11 Gray, 409; *White v. Livingston*, 10 Cush. 259; *Putnam v. Wise*, 1 Hill, 244; *Jackson v. Delacroix*, 2 Wend. 438; *Walker v. Fitts*, 24 Pick. 181; *Dingman v. Kelly*, 7 Ind. 717; *Doe v. Ries*, 8 Bing. 182; *Doe v. Benjamin*, 9 A. & E. 650. “Shall hold and enjoy” have also been held to be words of present demise. *Doe v. Ashburner*, 5 T. R. 168; *Moshier v. Reding*, 12 Me. 135; *Wilson v. Martin*, 1 Denio, 602; *Watson v. O’Hern*, 6 Watts, 362; *Moore v. Miller*, 8 Pa. St. 272.

of the wishes of the parties, and it can be altered or amended to effectuate their intention.¹ The ordinary rule of construction is that where the agreement leaves nothing further to be done by the parties, and contains directly, or by reference to other papers or records, all the provisions that are necessary to a valid lease, the instrument will be treated as a present demise.² And even where a fuller lease is stipulated for, although this clause standing alone would give to the agreement the character of a contract for a lease, yet if there are proper words of present demise, the covenant for a future lease will be treated merely as a covenant for further assurance, and the agreement will take effect as a present demise.³ And where the agreement admits of either construction the acts and declaration of the parties may be introduced, as indications of their intention and their understanding of the agreement.⁴

¹ 1 Washb. on Real Prop. 453.

² *Kabley v. Worcester Gas Co.*, 102 Mass. 394; *Shaw v. Farnsworth*, 108 Mass. 357. See *Weed v. Crocker*, 13 Gray, 219; *Hallett v. Wylie*, 3 Johns. 47; *Jackson v. Delacroix*, 2 Wend. 433; *Averill v. Taylor*, 8 N. Y. 44; *Morgan v. Bissell*, 3 Taunt. 65; *Haven v. Wakefield*, 39 Ill. 509.

³ *Alderman v. Neate*, 4 M. & W. 719; *Jackson v. Kisselbrack*, 10 Johns. 336; *Whitney v. Allaire*, 1 N. Y. 305; *The People v. Gillis*, 24 Wend. 201; *Jackson v. Myers*, 3 Johns. 395; *Bacon v. Bowdoin*, 22 Pick. 401; *Jackson v. Eldridge*, 3 Story, 325; *Aiken v. Smith*, 21 Vt. 172. In *Buell v. Cork*, 4 Conn. 238, it was held to be a contract for a lease, because the consent of a third person was required to make a valid lease; and in *Jackson v. Delacroix*, 2 Wend. 433, where the instrument contained a statement that alterations were expected to be made in the terms, it was held to be a contract for a future lease. See *Poole v. Bentley*, 12 East, 168; *Jones v. Reynolds*, 1 Q. B. 517; *Doe v. Benjamin*, 9 A. & E. 644; *Chapman v. Towner*, 6 M. & W. 100. In *Thornton v. Payne*, 5 Johns. 74, the court say: "In every case decided in the English courts where agreements have been adjudged not to operate by passing an interest, but to rest in contract, there has been either an express agreement for a future lease, or, construing the agreement to be a lease *in presenti* would work a forfeiture, or the terms have not been fully settled, and something further was to be done." The presumption is always in favor of its being a present lease, instead of a contract for a future lease.

⁴ *Chapman v. Black*, 4 Bing. N. C. 187; *Alderman v. Neate*, 4 M. & W. 704; *Doe v. Ashburner*, 5 T. R. 163.

§ 180. **Acceptance of lease necessary.** — In order that the lessor may be divested of his possession and of his rights incident to possession, and the lessee be bound by the term of the lease, acceptance by the latter must be shown. Where it operates entirely to his benefit, his acceptance may be presumed; while in other cases, it may be inferred from acts, such as entry into possession, and the like, as well as established by words of formal acceptance.¹

§ 181. **Relation of landlord and tenant.** — As soon as a lease has been delivered and accepted by parties competent to contract,² a relation is established between the lessor and lessee which is known as that of landlord and tenant. A privity of estate and a tenure are established, which bind the parties to each other in respect to the duties imposed by the law and the implied covenants. This obligation exists no longer than does the relation of landlord and tenant, while the obligations imposed and created by the express terms and provisions of the instrument rest upon privity of contract, and survive the dissolution of such relation.³

§ 182. **Assignment and subletting.** — Unless restrained by a covenant or changed by statute the lessee can assign his term or grant a sublease of the same, without let or hindrance of the lessor.⁴ And a restriction against assignment does not

¹ *Maynard v. Maynard*, 10 Mass. 456; *Hedge v. Drew*, 12 Pick. 141; *Kramer v. Cook*, 7 Gray, 550; *Jackson v. Dunlap*, 1 Johns. Cas. 114; *Jackson v. Bodle*, 20 Johns. 184; *Jackson v. Richards*, 6 Cow. 617.

² See *post*, sects. 791, 792, 793, 809, for a discussion of the subjects, delivery and competency of parties.

³ 1 Washb. on Real Prop. 468, 469.

⁴ *King v. Aldborough*, 1 East, 597; *Roe v. Sales*, 1 M. & Sel. 297; *Taylor's L. & T.* 22; 1 Washb. on Real Prop. 507, 508; *Cottee v. Richardson*, 7 Ex. Rep. 143; *Brown v. Powell*, 25 Pa. St. 329; *Shannon v. Burr*, 1 Hilt. 39; *Den v. Post*, 25 N. J. L. 285; *Robinson v. Perry*, 21 Ga. 133; *Crommelin v. Thiess*, 31 Ala. 421.

prevent a subletting, and *vice versa*. The restriction must apply expressly to both, in order to restrain both.¹ The assignment or sublease is subject to the same requirements of the Statute of Frauds, as the original lease.² An assignment is effected, whenever the entire term is disposed of, leaving nothing in the lessee by way of a reversion. And a grant will be considered and treated as an assignment, whether it be in the form of a new lease, or merely a transfer of the old lease. The decisive question is, whether there is a reversion left in the lessee; and a grant of a portion of the premises for the entire term would be an assignment, and not a sublease of such portion.³ But if the whole, or only a part, of the premises be demised for a term of shorter duration than that of the lessee, it is a subletting. And the most inconsiderable reversion, such as the last day of the term, would be sufficient to give the grant the character of an under-lease.⁴ It has been held and likewise denied, that the reservation of a right of entry for breach of a condition would be such a reservation of a reversion, as to make the demise a subletting. The better opinion is that a right of entry will have no such effect, if

¹ *Greenaway v. Adams*, 12 Ves. 400; *Beardman v. Wilson*, L. R. 4 C. B. 57; *Lynde v. Hough*, 27 Barb. 415; *Den v. Post*, 25 N. J. L. 285; *Field v. Mills*, 33 N. J. L. 254; *Hargrave v. King*, 5 Ired. Eq. 430.

² 1 Washb. on Real Prop. 508; *Williams on Real Prop.* 402.

³ *Palmer v. Edwards*, Dougl. 187, note; *Parmenter v. Webber*, 8 Taunt. 593; *Boardman v. Wilson*, L. R. 4 C. B. 57; *Wollaston v. Hakewell*, 3 M. & G. 323; *Plush v. Digges*, 5 Bligh (N. S.), 31; *Pollaek v. Stacy*, 9 Q. B. 1033; *Sanders v. Partridge*, *Lynde v. Hough*, 27 Barb. 415; *Patten v. Deshon*, 1 Gray, 325; *Sands v. Hughes*, 53 N. Y. 293; *Bedford v. Terhune*, 30 N. Y. 457. But see *Fulton v. Stuart*, 2 Ohio, 369, and *McNiell v. Kendall*, 128 Mass. 245; 35 Am. Rep. 373, where transfer of a part of premises for the whole term was considered a subletting.

⁴ *Post v. Kearney*, 2 N. Y. 394; *Collins v. Hasbrouck*, 56 N. Y. 157; 15 Am. Law Rep. 407; *Astor v. Miller*, 2 Paige, 68; *Pingrey v. Watkins*, 15 Vt. 479; *Martin v. O'Connor*, 43 N. Y. 522; *Linden v. Hepburn*, 3 Sandf. 668; *Patten v. Deshon*, 1 Gray, 325; *Parmenter v. Webber*, 8 Taunt. 593; *Pollock v. Stacy*, 9 Q. B. 1033; *Derby v. Taylor*, 1 East, 502.

the whole term has been granted.¹ If the demise is an assignment, the assignee enters into the privity of estate with the original lessor and becomes thereby liable to him on the covenants of the original lease, which run with and bind the land. But his liability only continues during the continued maintenance of this privity of estate, and does not extend to breaches occurring before assignment to him or after his alienation of the term.² Actual entry into possession is not necessary to attach such liability to the assignee during the time that the term is vested in him, except that in some States actual entry is required in order to render the assignee liable on the covenant for rent.³ Where the assignment is by way of a mortgage, actual entry is always necessary.⁴ If the demise be only a sub-

¹ That the reservation of a right of entry upon failure to pay rent makes the transfer a subletting, see *Kearney v. Post*, 1 Sandf. 105; *Martin v. O'Connor*, 43 Barb. 522; *Linden v. Hepburn*, 3 Sandf. 670. In the following cases the rule is denied 2 Prest. Conv. 124, 125; *Palmer v. Edwards*, Dougl. 187, note; *Doe v. Bateman*, 2 B. & Ald. 168; *Lloyd v. Cozers*, 2 Ashm. 133; *Davis v. Morris*, 36 N. Y. 575; *Smiley v. Van Winkle*, 6 Cal. 605. See *Bedford v. Terhune*, 30 N. Y. 457; *Sanders v. Partridge*, 103 Mass. 558. In a note to *King v. Wilson*, 5 Man. & R. 157, note, it is stated that there is "neither principle nor authority, to preclude such termor from making an *underlease* for a period commensurate in point of computation with the original term."

² *Stevenson v. Lambard*, 2 East, 575; *Burnett v. Lynch*, 5 B. & C. 589; *University of Vermont v. Joslyn*, 21 Vt. 52; *Howland v. Coffin*, 12 Pick. 125; *Graham v. Way*, 38 Vt. 19; *Davis v. Morris*, 36 N. Y. 576; *Jackson v. Davis*, 5 Cow. 129; *McKeon v. Whitney*, 3 Denio, 452; *Benson v. Bolles*, 8 Wend. 175; *Barroilhet v. Battele*, 7 Cal. 450; *Grandin v. Carter*, 99 Mass. 16; *Sanders v. Partridge*, 103 Mass. 556; *Walton v. Cronly*, 14 Wend. 62; *Quackenboss v. Clark*, 12 Wend. 557; *Armstrong v. Wheeler*, 9 Cow. 89; *Patten v. Deshon*, 1 Gray, 329; *Johnson v. Sherman*, 15 Cal. 287.

³ *Felch v. Taylor*, 13 Pick. 139; *Bagley v. Freeman*, 1 Hilt. 196; *Smith v. Brinker*, 17 Mo. 148. In New York, entry into possession is necessary, to render liable on covenant for rent. *Damainville v. Mann*, 32 N. Y. 197. In Massachusetts the assignee is liable for rent without entry, if the assignment is by deed. *Sanders v. Partridge*, 103 Mass. 556. In Illinois entry is never necessary. *Babcock v. Scoville*, 56 Ill. 466.

⁴ *Williams v. Bosanquet*, 1 Brod. & B. 238; *Felch v. Taylor*, 13 Pick. 133; *Pingrey v. Watkins*, 15 Vt. 488; *Graham v. Way*, 38 Vt. 24; *McMurphy v. Minot*, 4 N. H. 251; *Walton v. Cronly*, 14 Wend. 63; *Astor v. Hoyt*, 5 Wend.

lease, the privity of estate between the lessee and the original lessor is still maintained, and the sublessee is only liable to the intermediate lessor on the covenants in the lease between them. And a reservation of rent by the intermediate lessor, if it is an assignment, will not give him a right to distrain for it. His remedy is an action to recover on the covenant.¹

§ 183. **Involuntary alienation.**—A leasehold estate is also subject to sale under execution, and under the bankrupt and insolvent laws passes to the assignee, like other personal property, for the satisfaction of the lessee's debts.² And such assignees become liable on the covenants of the lease, if they accept the assignment, and exercise the rights of ownership over it.³ But the assignees have the right within a reasonable time to elect whether they shall accept

603; *Astor v. Miller*, 2 Paige, 68; *McKee v. Angelrodt*, 16 Mo. 283. In Maryland, entry is not necessary. *Mayhew v. Hardisty*, 8 Md. 479. See also, *Calvert v. Bradley*, 16 How. (U. S.) 593; *Johnson v. Sherman*, 15 Cal. 287.

¹ *Hicks v. Dowling*, 1 Ld. Raym. 99; *Parmenter v. Webber*, 8 Taunt. 593; *Bedford v. Terhune*, 30 N. Y. 458; *Davis v. Morris*, 36 N. Y. 574. In order that the assignee may be protected against an ouster by the original lessor, for failure of the lessee to pay the rent due him, it has been held that, before the lessee can recover of his assignee, he must show that the lessor's claim has been satisfied. *Farrington v. Kimball*, 126 Mass. 313; 30 Am. Rep. 680. And if the rent reserved in the second lease be larger than what is reserved in the first, the parties may, by agreement, provide, that the lessee shall recover only the difference, while the sublessee pays the original rent to the lessor. *Wollaston v. Hakewell*, 3 M. & G. 323; *Smith v. Mapleback*, 1 T. R. 441. But without express agreement, the lessor cannot sue the sublessee for rent. There is neither privity of estate, nor privity of contract, between them to sustain the action. *Halford v. Hatch*, Dougl. 187; *Grandin v. Carter*, 98 Mass. 16; *Dartmouth College v. Clough*, 8 N. H. 22; *McFarlan v. Watson*, 3 N. Y. 286. But if the original lease is surrendered to the lessor, without prejudice to under-lessees, the lessor may recover subsequently accruing rent from the sublessees. *Beal v. Boston, etc., Car Co.*, 125 Mass. 157; 28 Am. Rep. 216.

² *Williams on Real Prop.* 404; *Williams on Pers. Prop.* (9th ed.) 56.

³ *White v. Hunt*, L. R. 6 Exch. 32; *Quackenboss v. Clarke*, 12 Wend. 555; 1 Washb. on Real Prop. 523, 524.

or reject the lease. The mere fact that the lease is properly included in the assignment will not render them liable on the covenants.² Involuntary alienation may be prevented, if it is explicitly stated in the lease, that such a mode of alienation will work a forfeiture of the term.² But a simple restriction against alienation does not apply to involuntary alienation. Nothing short of an actual and voluntary transfer of the lessee's estate will ordinarily be considered a breach of a condition or covenant against assignment.³

§ 184. **Disposition of terms after death of tenant.** — A term, like other personal property, can be bequeathed, or if the tenant dies without making any disposition, it descends to the executor or administrator, who takes it and disposes of it like any other chattel, unless the restriction against alienation expressly includes the personal representatives in such prohibition.⁴ And the right to devise a leasehold is not taken away by a general condition in restraint of alienation, although it may be by express limitation.⁵

§ 185. **Covenants in a lease in general.** — In strict,

¹ *Smythe v. North*, L. R. 7 Exch. 242; *Carter v. Warne*, 4 C. & P. 191; *Copeland v. Stephens*, 1 B. & Ald. 593; *Pratt v. Levan*, 1 Miles, 358; *Blake v. Sanderson*, 1 Gray, 332; *Journey v. Brackley*, 1 Hilt. 448; *Kendrick v. Judas*, 2 Caines, 25; *Carter v. Hammett*, 18 Barb. 608; *Sparkaw v. Broome*, 6 Binn. 256; *Dorrance v. Jones*, 27 Ala. 630.

² *Roe v. Galliers*, 2 T. R. 133; *Davis v. Eyton*, 7 Bing. 151. See *Doe v. Hawks*, 2 East, 481; *Doe v. Clark*, 8 East, 185; *Doe v. David*, 5 Tyrw. 125; *Cooper v. Wyatt*, 5 Madd. 482; *Yarnold v. Moorhouse*, 1 R. & Myl. 346.

³ *Philpot v. Hoare*, 2 Atk. 219; *Doe v. Bevan*, 3 M. & S. 353; *Doe v. Carter*, 8 T. R. 300; *Lear v. Leggett*, 1 Russ. & M. 690; *Smith v. Putnam*, 3 Pick. 221; *Jackson v. Corlis*, 7 Johns. 531; *Moore v. Pitts*, 53 N. Y. 85; *Collins v. Hasbrouck*, 56 N. Y. 157; 15 Am. Rep. 407; *Hargrave v. King*, 5 Ired. Eq. 430. But a voluntary assignment under the bankrupt and insolvent laws is not an involuntary alienation. See 1 Pars. on Con. 506.

⁴ *Taylor's L. & T.*, sect. 408; *Seers v. Hind*, 1 Ves. jr. 295; *Keating v. Condon*, 68 Pa. St. 75; 1 Washb. on Real Prop. 579.

⁵ *Fox v. Swann*, Styles, 483; *Berry v. Taunton*, Cro. Eliz. 331; *Dumpor v. Symmons*, *Id.* 816

technical language, a covenant is any agreement which is executed under the solemnity of a seal; but in this connection it is used to signify the agreements which appear in a lease, and which bind the parties thereto, whether the lease is under seal or not.¹

§ 186. **Continued — Express and implied covenants.** — Covenants may be *express* or *implied*. There is apparently no restriction upon the number and character of the express covenants which may be inserted in a lease. The parties may by them change altogether their common-law liability under the lease, and substitute for the general rule of law express limitations and obligations.² Implied covenants are those which arise by construction of law from the employment of certain words and forms of expression, such as “grant,” “lease,” “demise,” etc.³ An important distinction exists between express and implied covenants in respect to the effect of assignment of the lease upon the liability of the lessee. He remains bound by all the express covenants contained in the lease. His liability under them rests upon

¹ *Hayne v. Cummings*, 16 C. B. (N. S.) 426. No reference is made here to the common-law form of the action to be used in the enforcement of covenants in leases. The action of covenant would lie only in the case of an agreement under seal, signed and sealed by the covenantor. See *Goodwin v. Gilbert*, 9 Mass. 510; *Pike v. Brown*, 7 Cush. 133; *Johnson v. Mussey*, 45 Vt. 419; *Hinsdale v. Humphrey*, 15 Conn. 431; *Gale v. Nixon*, 6 Cow. 445; *Maule v. Weaver*, 7 Pa. St. 329.

² 1 Washb. on Real Prop. 505.

³ 1 Washb. on Real Prop. 487. But the tendency of modern decisions is against implying covenants, which might have been expressed, and this is particularly the case where the deed appears to contain all the stipulations and conditions which the parties intended. See *Aspden v. Austin*, 5 Ad. & El. (N. S.) 684; *Sheets v. Selden*, 7 Wall. 423. It has been held that the covenant for quiet enjoyment is implied from the use of any operative words. *Mack v. Patchin*, 42 N. Y. 167; 1 Am. Rep. 506. But, generally, “lease” and “demise” are the only words which will raise implied covenants. See *Tone v. Bruce*, 8 Paige, 597; *Mayor v. Mabie*, 13 N. Y. 160; *Maule v. Ashmead*, 20 Pa. St. 482; *Lovering v. Lovering*, 13 N. H. 518; *Hamilton v. Wright*, 28 Mo. 199; *Wade v. Halligan*, 16 Ill. 507; *Playter v. Cunningham*, 21 Cal. 233.

express personal obligation. But the liability under an implied covenant arises from the privity of estate created between the parties by the possession of the lessee under the lease. The lessee's liability, therefore, on implied covenants determines with the destruction of the privity by assignment or otherwise.¹ Acceptance of the assignee as a tenant by the original lessor is necessary in order to absolve the lessee from his liability for rent under an implied covenant.² The following covenants are usually implied in every lease.

§ 187. **Implied covenant for quiet enjoyment.** — This is a covenant for the quiet enjoyment of the premises by the lessee. It is not an absolute covenant for the protection of his possession against the acts of the whole world. It extends only to the acts of the landlord and of strangers asserting a paramount title. The lessor does not warrant against the acts of strangers who do not claim a superior title.³

¹ *Auriol v. Mills*, 4 T. R. 98; *Thursby v. Plant*, 1 Saund. 241 b; *Way v. Reed*, 6 Allen, 364; *Kimpton v. Walker*, 9 Vt. 199; *Kunckle v. Wynick*, 1 Dall. 305; *Walker v. Physick*, 5 Pa. St. 193; *Waldo v. Hall*, 14 Mass. 486; *Sutcliffe v. Atwood*, 15 Ohio St. 186; *Wall v. Hinds*, 4 Gray, 250; *Blair v. Rankin*, 11 Mo. 440; *Post v. Jackson*, 17 Johns. 239; *Quackenboss v. Clark*, 12 Wend. 556; *Ghegan v. Young*, 23 Pa. St. 18; *Howland v. Coffin*, 12 Pick. 125; *Bailey v. Wells*, 8 Wis. 141; *Lodge v. White*, 30 Ohio St. 569; 27 Am. Rep. 492.

² *Auriol v. Mills*, 4 T. R. 98; *Thursby v. Plant*, 1 Saund. 240; *Fletcher v. McFarlane*, 12 Mass. 43; *Wall v. Hinds*, 4 Gray, 256.

³ *Morse v. Goddard*, 13 Metc. 177; *Ross v. Dysart*, 33 Pa. St. 452; *Moore v. Webber*, 71 Pa. St. 429; 10 Am. Rep. 708; *Edgerton v. Page*, 1 Hilt. 333; *Dexter v. Manley*, 4 Cush. 24; *Sherman v. Williams*, 113 Mass. 481; 18 Am. Rep. 522; *Mack v. Patchin*, 42 N. Y. 167; 1 Am. Rep. 506; *Schilling v. Holmes*, 23 Cal. 230; *Branger v. Manciet*, 30 Cal. 626; *Lovering v. Lovering*, 13 N. H. 518; *Wade v. Halligan*, 16 Ill. 507; *Hamilton v. Wright*, 28 Mo. 199; *Schuykill, etc., R. R. v. Schmoele*, 57 Pa. St. 273. There is an implied covenant for quiet enjoyment in the grant of an incorporeal, as well as of a corporeal, hereditament. *Mayor v. Mabie*, 13 N. Y. 157. To support the implied covenant, the lease must be a valid one. *Webster v. Conley*, 46 Ill. 17.

§ 188. **Implied covenant for rent.** — The covenant for rent is implied from the very reservation in the lease of a certain stipulated sum. This implied covenant is, of course, separate and distinct from any express contracts the lessor may enter into.¹

§ 189. **Implied covenant against waste.** — By the very acceptance of the lease, the lessee assumes an implied obligation to use the premises in a husbandlike manner, and to keep the buildings and other structures in repair; and a failure on his part, to do so, subjects him to an action of waste.² The lessor, in the absence of an express covenant, is not bound to make repairs upon the leased premises. But if he does undertake to make such repairs, he is bound by an implied covenant to do it in a workmanlike manner, without injury to the lessee.³ The lessor or lessee may enter into express covenants for the repair of the premises under all circumstances, and an unqualified covenant of this kind will obligate the covenantor to repair, whatever may have caused the damage.⁴ But the implied covenant of the

¹ *Kimpton v. Walber*, 9 Vt. 198; *Van Rensselaer v. Smith*, 27 Barb. 140; *Royer v. Ake*, 3 Pa. St. 461; 1 Washb. on Real Prop. 492.

² *Thorndike v. Burrage*, 111 Mass. 532; *Nave v. Berry*, 22 Ala. 382; 1 Washb. on Real Prop. 492. See *ante*, sects. 72-80, as to what acts constitute waste.

³ *Gott v. Gaudy*, 22 Eng. Law & Eq. 173; *Sheets v. Selden*, 7 Wall. 423; *Leavitt v. Fletcher*, 10 Allen, 121; *Gill v. Middleton*, 105 Mass. 478; *Elliott v. Aiken*, 45 N. H. 36; *Doupe v. Gerrin*, 45 N. Y. 119; 6 Am. Rep. 47; *Post v. Vetter*, 2 E. D. Smith, 248; *Estep v. Estep*, 23 Ind. 114. There is no implied covenant on the part of the landlord, that the premises are in a tenantable condition. *Jaffe v. Harteau*, 56 N. Y. 398; 15 Am. Rep. 438. But although the landlord is not under obligation to tenant to repair, if the tenant does not repair, and injury results to third persons, the landlord has been held liable. *Marshall v. Cohen*, 44 Ga. 489; 9 Am. Rep. 170.

⁴ *Walton v. Waterhouse*, 2 Saund. 422; *Abby v. Billups*, 35 Miss. 618; *Phillips v. Stevens*, 16 Mass. 238; *Leavitt v. Fletcher*, 10 Allen, 121; *Warner v. Hitchins*, 5 Barb. 666; *Hoy v. Holt*, 91 Pa. St. 88; 36 Am. Rep. 559; *Gibbon v. Eller*, 13 Ind. 128. But where an ordinance of a city, passed subsequently, prohibits the erection of wooden buildings, the covenantor in a cove-

lessee extends only to repairs made necessary by the negligence of the lessee. If he uses the land in a husbandlike manner, he is not liable to repair any damage done by the elements or strangers without his fault.¹

§ 190. **Covenants running with land.** — If the covenant is beneficial only to the owner of the land, whether he be the tenant of the freehold or of the term, and relates to the preservation or improvement of the land, it runs with the land, passes to the assignee of the lessor or lessee, as the case may be, and can be enforced by him.² A covenant is said to run with the land, so as to bind assignees, when it relates to the management and conduct of the land, or where its performance forms a part of the original consideration upon which the lease rests.³ The usual covenants running with the land are those for quiet enjoyment;⁴ to

nant to rebuild a wooden building is thereby released from the obligation to perform. *Cordes v. Miller*, 39 Mich. 581; 33 Am. Law Rep. 430. And a covenant to erect a new building does not, by implication, include the rebuilding of it after destruction by fire or otherwise. *Cowell v. Lumley*, 39 Cal. 151; 2 Am. Rep. 430.

¹ *Wells v. Castles*, 3 Gray, 323; *Leavitt v. Fletcher*, 10 Allen, 121; *Post v. Vetter*, 2 E. D. Smith, 248; *Warner v. Hitchins*, 5 Barb. 666; *Elliott v. Aikin*, 45 N. H. 36; *Gibson v. Eller*, 13 Ind. 128.

² *Spencer's Case*, 5 Rep. 16; 1 Smith's Ld. Cas. 139; *Vyvyan v. Arthur*, 1 B. & C. 410; *Patton v. Deshon*, 1 Gray, 325; *Howland v. Coffin*, 12 Pick. 125; *Van Rensselaer v. Hays*, 19 N. Y. 81; *Van Rensselaer v. Smith*, 27 Barb. 151; *Nicholl v. N. Y. & Erie R. R.*, 12 N. Y. 131; *Streaper v. Fisher*, 1 Rawle, 161; *Cook v. Brightley*, 46 Pa. St. 445; *Scott v. Lunt*, 7 Pet. 606; *Baldwin v. Walker*, 21 Conn. 168; *Crawford v. Chapman*, 17 Ohio, 449; *Plumleigh v. Cook*, 13 Ill. 669. In Illinois, the assignee of the covenantor's estate cannot sue on the covenant in his own name unless the covenantee has attorned to him. *Fisher v. Deering*, 60 Ill. 114. And at no time has it been permitted of the assignee to sue for breaches of the covenant occurring before assignment. *Lewis v. Ridge*, Cro. Eliz. 863; *Gibbs v. Ross*, 2 Head, 487; 1 Washb. on Real Prop. 498.

³ *Morse v. Aldrich*, 19 Pick. 749; *Piggot v. Mason*, 1 Paige Ch. 412; *Norman v. Wells*, 17 Wend. 136; *DeForrest v. Byrne*, 1 Hilt. 43; *Jackson v. Langhead*, 2 Johns. 75; *Wooliscroft v. Norton*, 15 Wis. 204; *Blackmore v. Boardman*, 28 Mo. 420; *Gordon v. George*, 12 Ind. 408.

⁴ *Campbell v. Lewis*, 3 B. & Ald. 392; *Williams v. Burrell*, 1 C. B. 433; *Shelton v. Codman*, 3 Cush. 318; *Markland v. Cramp*, 1 Dev. & B. 94.

insure;¹ to repair;² to pay rent;³ to pay taxes;⁴ to renew the lease.⁵ A covenant for lessor to pay for improvements passes to the assignee of the lessee, but does not bind the assignee of the reversion.⁶ Covenants which relate to a subject-matter not *in esse*, as for the erection of a new building upon the premises, do not run with the land so as to bind assignees, unless they are expressly named therein.⁷ On the other hand, if the covenant be of a collateral nature, *i.e.*, to the land, it is a personal obligation, and does not run with the land. And if it is incapable in law of attaching to the estate, it will not bind or enure to assignees, even though they are expressly named.⁸

§ 191. **Conditions in leases.**—In connection with the covenants in a lease, it may be provided that the breach of the covenant will work a forfeiture of the estate, and give the covenantee the right of entry upon the land. But the breach of a covenant will not work a forfeiture, unless the right of entry is expressly reserved.⁹ The attachment of a

¹ *Vernon v. Smith*, 5 B. & Ald. 1.

² *Spencer's Case*, 5 Rep. 16; 1 *Smith Ld. Cas.* 139; *Demarest v. Willard*, 8 Cow. 206; *Pollard v. Shaffer*, 1 Dall. 210; *Taffe v. Harteau*, 56 N. Y. 398; 15 Am. Rep. 438.

³ *Graves v. Potter*, 11 Barb. 592; *Main v. Feathers*, 21 Barb. 646; *Demarest v. Willard*, 8 Cow. 206; *Howland v. Coffin*, 12 Pick. 125; *Hurst v. Rodney*, 1 Wash. C. Ct. 375.

⁴ *Astor v. Miller*, 2 Paige, 68; *Host v. Kearney*, 2 N. Y. 394.

⁵ *Piggot v. Mason*, 1 Paige, 412; *Renond v. Daskam*, 34 Conn. 512; *Blackmore v. Boardman*, 28 Mo. 420. But see *West. Transp. Co. v. Landing*, 49 N. Y. 499.

⁶ *Hunt v. Danforth*, 2 Curt. 592. See next note.

⁷ *Spencer's Case*, 5 Rep. 16; 1 *Smith Ld. Cas.* 139; *Congleton v. Pattison*, 10 East, 138; *Sampson v. Easterly*, 9 B. & C. 505; *Tallman v. Coffin*, 4 N. Y. 134; *Masury v. Southworth*, 9 Ohio St. 340; *Bean v. Dickerson*, 2 *Humph.* 126; *Hanson v. Meyer*, 81 Ill. 321; 25 Am. Rep. 282.

⁸ *Spencer's Case*, 5 Rep. 16; 1 *Smith's Ld. Cas.* 139; *Keppell v. Bailey*, 2 *Mylne & R.* 517; *Masury v. Southworth*, 9 Ohio St. 340. See *Vyryan v. Arthur*, 1 B. & C. 410; *Aiken v. Albany R. R.*, 26 Barb. 289.

⁹ *Doe v. Jepson*, 3 B. & Ald. 402; *Jones v. Carter*, 15 M. & W. 718; *Clark v. Jones*, 1 Denio, 516; *Delancey v. Ganong*, 9 N. Y. 9; *Wheeler v.*

condition of forfeiture to a covenant does not, however, interfere with a resort to the ordinary remedies on the covenant.¹ Like all other conditions, they can only be reserved to the landlord and his assigns, and they alone can take advantage of the breach. If they elect to waive the forfeiture, the estate continues with all the obligations attached thereto.² The subject of estates upon condition is treated more specifically in a subsequent chapter, to which reference must be made, to ascertain in detail the effect of a breach of a condition.

§ 192. **Rent reserved.** — Although not necessary to the validity of a lease, it is customary and usual to reserve a rent to be paid by the lessee, and its payment is enforced by the insertion of an express covenant, or such a covenant is implied from its reservation. The covenant for rent passes with the assignment of the reversion to the assignee.³

Earl, 5 Cush. 31; *Den v. Post*, 25 N. J. L. 292; *Dennison v. Reed*, 3 Dana, 586; *Brown v. Bragg*, 22 Ind. 123. But the presumption of law is always against the attachment of a condition; the condition must be clearly expressed, in order to attach to the covenant. *Doe v. Phillips*, 2 Bing. 13; *Spear v. Fuller*, 8 N. H. 174; *Wheeler v. Dascombe*, 3 Cush. 285; *Burnes v. McCubbin*, 3 Kan. 226. And conditions are always liberally construed in favor of the covenantor or tenant, and strictly against the grantor. *Doe v. Bond*, 5 B. & C. 855; *Pillot v. Boosey*, 11 C. B. (N. S.) 885; *Spear v. Fuller*, 8 N. H. 174; *Mattice v. Lord*, 30 Barb. 38; *Palethorp v. Bergner*, 52 Pa. St. 149; *Mackubin v. Whetcroft*, 4 Harr. & McH. 135; *Lawrence v. Knight*, 11 Cal. 298.

¹ See *Rowe v. Williams*, 97 Mass. 165.

² *Morton v. Woods*, L. R. 4 Q. B. 303; 18 Am. Law Rep. 525; *Shumway v. Collins*, 6 Gray, 231; *Way v. Reed*, 6 Allen, 364; *Bemis v. Wilder*, 100 Mass. 446; *Clark v. Jones*, 1 Denio, 517. An express license to break the covenant will constitute an absolute waiver of the condition, and the covenantee cannot enter for any subsequent breach. *Dumpor's Case*, 4 Rep. 119; *Cartwright v. Gardner*, 5 Cush. 281; *Bleecker v. Smith*, 13 Wend. 530; *Murray v. Harway*, 56 N. Y. 343; *Dickey v. McCullough*, 2 Watts & S. 88; *Chipman v. Emesic*, 5 Cal. 49. But a mere acquiescence in the breach, or a failure to enter for it, will not discharge the condition. *Doe v. Bliss*, 4 Taunt. 735; *Ireland v. Nichols*, 46 N. Y. 413.

³ *Scott v. Lunt*, 7 Pet. 590; *Kempton v. Veker*, 9 Vt. 198; *Gale v. Edwards*, 52 Me. 365; *Van Rensselaer v. Smith*, 27 Barb. 140; *Main v. Feathers*, 21 Barb. 646; *Royer v. Ake*, 3 Pa. St. 461; *Howland v. Coffin*, 12 Pick. 125; *Burden v.*

If the reversion be divided up, and portions of the same are assigned to different parties, the rent will be apportioned between them.¹ The same rule of apportionment prevails where the reversion descends to, and is partitioned between, two or more heirs.² In such cases it is questionable, if the assignee of a part of the reversion can sue for his aliquot share of the rent in his own name, without joining with the others.³ But the reversioner may sever the right to the rent from the reversion. He may assign them to different parties, or he may assign one and retain the other, and the holder of the rent may sue on the covenant even though he has no reversion in him.⁴ But in the assign-

Thayer, 3 Mete. 76; Keay v. Goodman, 16 Mass. 1; Demarest v. Willard, 8 Cow. 206; Hurst v. Rodney, 1 Wash. C. Ct. 375; York v. Jones, 2 N. H. 454; Kimball v. Pike, 18 N. H. 420; Johnston v. Smith, 3 Pa. St. 495; Van Rensselaer v. Gallup, 5 Denio, 450; Farley v. Craig, 10 N. J. L. 262; Wilson v. Delaplaine, 3 Harr. 499; Snyder v. Riley, 1 Spears, 272; Gibbs v. Ross, 2 Head, 437.

¹ Montague v. Gay, 17 Mass. 439; Mellis v. Lathrop, 22 Wend. 121; Burns v. Cooper, 31 Pa. St. 428; Reed v. Ward, 22 Pa. St. 144; Peck v. Northrup, 17 Conn. 217; Sampson v. Grimes, 7 Blackf. 176; Breeding v. Taylor, 13 B. Mon. 477. The apportionment is never made between several successive holders of the reversion according to the length of holding. Whoever owns the reversion when the rent is due receives the entire sum. Burden v. Thayer, 3 Mete. 76; Bank of Pennsylvania v. Wise, 3 Watts, 394; Martin v. Martin, 7 Md. 368.

² Jaques v. Gould, 4 Cush. 484; Cole v. Patterson, 25 Wend. 456; Bank of Pennsylvania v. Wise, 3 Watts, 394; Reed v. Ward, 22 Pa. St. 144; Crosby v. Loop, 13 Ill. 625. If the administrator collects the rent falling due after the death of the ancestor, he holds it as trustee for the heirs and the widow. Mills v. Merryman, 49 Me. 65; Drinkwater v. Drinkwater, 4 Mass. 358; Robb's Appeal, 41 Pa. St. 45; King v. Anderson, 20 Ind. 386.

³ See Martin v. Crompe, 1 Ld. Raym. 340; Wall v. Hinds, 4 Gray, 256; Porter v. Bleiler, 17 Barb. 155; Decker v. Livingston, 15 Johns. 479; Ryerson v. Quackenbush, 26 N. J. L. 254. But see Jones v. Felch, 3 Bosw. 363. But the assignees may, and should, sue in their own names. The rent passes as a vested interest in land, and is not a *chose in action*. Demarest v. Willard, 8 Cow. 200; Van Rensselaer v. Hays, 19 N. Y. 99; Ryerson v. Quackenbush, 26 N. J. L. 254; Dixon v. Nicolls, 39 Ill. 384; Abercrombie v. Redpath, 1 Iowa, 111; Crosby v. Loop, 13 Ill. 625.

⁴ Co. Lit. 47 a; Baker v. Gostling, 1 Bing. N. C. 19; Allen v. Bryan, 5 B. & C. 572; Patten v. Deshon, 1 Gray, 325; Hunt v. Thompson, 2 Allen, 342;

ment of the rent without the reversion, the lessor cannot divide it up among several without the consent of the lessee by attornment, although a devise of a part may be good without attornment.¹

§ 193. **Rent reserved — Condition of forfeiture.** — It is also often provided that the estate shall be subject to forfeiture if the rent is not paid. But in order that non-payment of rent may work a forfeiture of the lease, the common law requires that a demand should be made of the lessee for the precise amount of rent, on the day when it falls due, at a convenient time before sunset, and on the land, at the most prominent place upon it, — usually the front door of the dwelling-house, if there be any. A demand at an improper place, or at the wrong time, would not give the lessor right of entry for forfeiture of the estate.² But the parties may by agreement do away with any of the requirements, or even render a previous demand unnecessary; in which case, the right of entry accrues immediately upon the breach of the covenant.³

§ 194. **How relation of landlord and tenant may be terminated.** — The relation of landlord and tenant, and

Kendall v. Carland, 5 Cush. 74; *McMurphy v. Minott*, 4 N. H. 251; *Moffatt v. Smith*, 4 N. Y. 129; *Van Rensselaer v. Hays*, 19 N. Y. 99; *Van Rensselaer v. Read*, 26 N. Y. 577; *Ryerson v. Quackenbush*, 26 N. J. L. 254; *Crosby v. Loop*, 13 Ill. 625; *Dixon v. Nicolls*, 39 Ill. 384.

¹ *Ards v. Watkins*, Cro. Eliz. 637; *Ryerson v. Quackenbush*, 20 N. J. L. 254.

² *Doe v. Windlass*, 7 T. R. 117; *Doe v. Paul*, 3 C. & P. 613; *Conner v. Bradley*, 1 How. (U. S.) 211; *M'Murphy v. Minott*, 4 N. H. 251; *McQuestess v. Margan*, 34 N. H. 400; *Bradstreet v. Clark*, 21 Pick. 389; *Kimball v. Rowland*, 6 Gray, 224; *Chapman v. Harney*, 100 Mass. 354; *Ordway v. Remington*, 12 R. I. 319; 34 Am. Rep. 646; *Jackson v. Kipp*, 3 Wend. 230; *Jackson v. Harrison*, 17 Johns. 66; *Academy of Music v. Hackett*, 2 Hilt. 232; *M'Cormick v. Connell*, 6 Serg. & R. 151; *Tate v. Crowson*, 6 Ired. L. 66; *Phillips v. Doe*, 3 Ind. 132; *Meni v. Rathbone*, 21 Ind. 462; *Jenkins v. Jenkins*, 63 Ind. 415; 30 Am. Rep. 229; *Chapman v. Wright*, 20 Ill. 120; *Chapman v. Kirby*, 49 Ill. 121; *Byrane v. Rogers*, 8 Minn. 282.

³ *Doe v. Masters*, 2 B. & C. 490; *Fifty Associates v. Howland*, 5 Cush. 214; *Byrane v. Rogers*, 8 Minn. 282.

therewith the liability upon the covenants of the lease, can only be terminated by eviction, release or surrender of the premises.¹ The destruction, total or partial, of the premises, or their becoming untenable, from any cause except the acts of the lessor, will not relieve the parties from their covenants. The covenants for rent, repair, and restoration in good condition, are still binding. Destruction by fire or inevitable accident is no ground of defence, unless exceptions to that effect are inserted in the lease, or the State statute changes the liability of the parties.²

§ 195. **What constitutes eviction.** — Evictions are of two kinds, — *actual* or *constructive*. Actual eviction is where

¹ *Sheets v. Selden*, 7 Wall. 224; *Fuller v. Ruby*, 10 Gray, 290; *Bain v. Clark*, 10 Johns. 424; *Gates v. Green*, 4 Paige Ch. 355; *Dyer v. Wightman*, 66 Pa. St. 427.

² *Hill v. Woodman*, 14 Me. 38; *Kramer v. Cook*, 7 Gray, 550; *Phillips v. Stevens*, 16 Mass. 238; *Wells v. Castles*, 3 Gray, 325; *Hallet v. Wylie*, 3 Johns. 44; *Graves v. Beedan*, 29 Barb. 100; *Joffe v. Hartean*, 56 N. Y. 398; 15 Am. Rep. 438; *Dyer v. Wightman*, 66 Pa. St. 427; *Smith v. Ankrim*, 13 Serg. & R. 39; *Peterson v. Edmonson*, 5 Harr. 378; *White v. Molyneaux*, 2 Ga. 124; *Ward v. Bull*, 1 Fla. 271; *Nave v. Berry*, 22 Ala. 382; *Linn v. Ross*, 10 Ohio, 412; *Davis v. Smith*, 15 Mo. 467; *Niedelet v. Wales*, 16 Mo. 214; *Beach v. Farrish*, 4 Cal. 339; *Cowell v. Lumley*, 39 Cal. 151; 2 Am. Rep. 430. If the tenant has covenanted "to repair and deliver up," he would have to rebuild in the case of destruction by fire. *Bullock v. Dommitt*, 5 T. R. 650; *Hoy v. Holt*, 91 Pa. St. 88; *Maggort v. Hiansbarger*, 8 Leigh, 536; *Nave v. Berry*, 22 Ala. 382. And where the lessor had insured the premises, in the absence of a covenant, he is not obliged to apply it to the reconstruction of the building, in case of loss by fire. He may refuse, and still recover rent of the tenant. *Magaw v. Lambert*, 3 Pa. St. 444; *Bussman v. Ganster*, 72 Pa. St. 289; *Sheets v. Selden*, 7 Wall. 424; *Moffatt v. Smith*, 4 N. Y. 126; *Pope v. Garrard*, 39 Ga. 477; *Masury v. Southworth*, 9 Ohio St. 348. But now, as already stated in the text, the common law has in most of the States been changed, so that if the premises are destroyed by fire or other casualty, so far as to render them untenable, the tenant will be absolved from his liability for rent. See *Graves v. Berdan*, 26 N. Y. 502; *Coogan v. Parker*, 2 S. C. 255; 16 Am. Rep. 659; *Ripley v. Wightman*, 4 McCord, 447; *Coleman v. Haight*, 14 La. An. 564; *Whittaker v. Hawley*, 25 Kan. 674; 37 Am. Rep. 277; *Leavett v. Fletcher*, 10 Allen, 121; *Stow v. Russell*, 36 Ill. 35; *Alger v. Kennedy*, 49 Vt. 109.

the tenant is actually ousted of his possession of the premises, either by a stranger under a paramount title, or by acts of dispossession by the lessor.¹ But a disturbance of the possession by a stranger without claim of paramount title will not be an eviction.² Nor will the dispossession in the exercise of the right of eminent domain be such an eviction as will relieve the lessee from liability on his covenant for rent. It gives, however, an action for damages against the public for land so confiscated.³ Nor would dispossession by the public enemy abate the rent.⁴

§ 196. **Constructive eviction.** — Constructive eviction results when the lessor, by his own act or by his own procurement, renders the enjoyment of the premises impossible, or diminishes such enjoyment to a material degree.⁵

¹ *Robinson v. Deering*, 56 Me. 358; *Russell v. Fabyan*, 27 N. H. 543; *Boardman v. Osborn*, 23 Pick. 295; *Fitchburg Co. v. Melvin*, 15 Mass. 268; *Home Life Ins. Co. v. Sherman*, 46 N. Y. 372.

² *Welles v. Castles*, 3 Gray, 326; *Schuykill, etc., R. Co. v. Schmoele*, 57 Pa. St. 273; *Moore v. Webber*, 71 Pa. St. 429; 10 Am. Rep. 705; *Palmer v. Wetmore*, 2 Sandf. 316; *Royce v. Suggenhiem*, 106 Mass. 205; 8 Am. Rep. 322; *Hazlett v. Powell*, 30 Pa. St. 293.

³ *Parks v. Boston*, 15 Pick. 198; *Patterson v. Boston*, 20 Pick. 159; *Folts v. Huntley*, 7 Wend. 210; *Workman v. Mifflin*, 30 Pa. St. 362; *Peck v. Jones*, 70 Pa. St. 85; *Foote v. Cincinnati*, 11 Ohio, 408; *McLarren v. Spalding*, 2 Cal. 510. In Missouri a different rule is laid down, and if a part of the premises is appropriated to public use, the rent is reduced *pro tanto*. *Biddle v. Hussman*, 23 Mo. 597; *Kingsland v. Clark*, 24 Mo. 24. See *Gillespie v. Thomas*, 15 Wend. 468.

⁴ *Clifford v. Watts*, L. R. 5 C. P. 586; *Wagner v. White*, 4 Harr. & J. 564; *Schilling v. Holmes*, 23 Cal. 230; *contra*, *Bayley v. Lawrence*, 1 Bay, 499.

⁵ Thus, the renting of a part of a house to prostitutes is a constructive eviction of the tenant of the other part of the house. *Dyett v. Pendleton*, 8 Cow. 727; but see *contra*, *Dewett v. Pierson*. 112 Mass. 8; 17 Am. Rep. 58. Erections by the lessor, or with his consent, so near the premises as to seriously diminish the enjoyment, would constitute a constructive eviction. *Royce v. Guggenheim*, 100 Mass. 201; 8 Am. Rep. 322; *Sherman v. Williams*, 113 Mass. 481; 18 Am. Rep. 522; *Wright v. Lattin*, 38 Ill. 293. In short, any acts which destroy the premises, or render them useless, may operate as a constructive eviction. *Halligan v. Wade*, 21 Ill. 479; *Bentley v. Sill*, 35 Ill. 414; *Hayner v. Smith*, 63 Ill. 430; 14 Am. Rep. 124; *Edgerton v. Page*, 20

Slight acts of trespass, which do not by their material interference with the enjoyment of the premises compel the tenant to abandon the possession, is not a constructive eviction. The lessor is liable for them, however, like any other trespasser.¹ And to relieve the tenant from liability for rent on account of a constructive eviction, he must abandon the possession of the premises. Retention of possession will keep alive his liability on the covenants, even though his enjoyment of the premises is taken away altogether.² In the case of partial eviction, if it results from the acts of strangers, in violation of the lessor's covenant for quiet enjoyment, the tenant will be relieved from the covenant for rent to the extent of the eviction, while he remains liable to the lessor for the remainder.³ But if it be by procurement of the lessor, the entire rent is suspended during the continuance of such eviction, and the lessee may elect to abandon the premises, thus terminating the tenancy and his liability for rent altogether.⁴ In all

N. Y. 281; *St. John v. Palmer*, 5 Hill, 599; *Bennett v. Bittle*, 4 Rawle, 339; *Pier v. Carr*, 69 Pa. St. 326; *Martin v. Martin*, 7 Md. 375; *Lawrence v. French*, 25 Wend. 443; *Fuller v. Ruby*, 10 Gray, 290; *Wilson v. Smith*, 5 Yerg. 399; *Jackson v. Eddy*, 12 Mo. 209; *Alger v. Kennedy*, 49 Vt. 109; 24 Am. Rep. 127.

¹ *Edgerton v. Page*, 20 N. Y. 281; *Gardner v. Ketelas*, 3 Hill, 330; *Elliott v. Aiken*, 45 N. H. 35; *Bennett v. Bittle*, 4 Rawle, 339; *Briggs v. Hall*, 4 Leigh, 485; *Wilson v. Smith*, 5 Yerg. 399; *Day v. Watson*, 8 Mich. 535. See *Hayner v. Smith*, 63 Ill. 430; 14 Am. Rep. 124.

² *Edgerton v. Page*, 20 N. Y. 281; *Hurlbut v. Post*, 1 Bosw. 28; *Dyett v. Pendleton*, 8 Cow. 727; *Jackson v. Eddy*, 12 Mo. 209; *Royce v. Guggenheim*, 106 Mass. 201; 8 Am. Rep. 322; *Lounsberry v. Snyder*, 31 N. Y. 514; *Alger v. Kennedy*, 49 Vt. 109; 24 Am. Rep. 127, and cases in preceding note.

³ *Morrison v. Chadwick*, 7 C. B. 283; *Hegeman v. Arthur*, 1 E. D. Smith, 147; *Lawrence v. French*, 25 Wend. 443; *Blair v. Claxton*, 18 N. Y. 529; *Dyett v. Pendleton*, 8 Cow. 727; *Martin v. Martin*, 7 Md. 375.

⁴ *Lewis v. Paig*, 4 Wend. 423; *Christopher v. Austin*, 11 N. Y. 216; *Edgerton v. Page*, 20 N. Y. 281; *Shumway v. Collins*, 6 Gray, 227; *Leishman v. White*, 1 Allen, 489; *Reed v. Reynolds*, 37 Conn. 469; *Colburn v. Morrill*, 117 Mass. 262; 19 Am. Rep. 415; *Royce v. Guggenheim*, 106 Mass. 201; 8 Am. Rep. 322; *Smith v. Stigleman*, 58 Ill. 141; *Wilson v. Smith*, 5 Yerg.

cases of eviction the tenant is exempt from the payment of rent from the last pay-day prior to such eviction; but the liability for rent revives if the tenant, after the eviction, should resume possession of the premises.¹ If the eviction is only partial, the resumption of possession will not render the tenant liable for the intermediate rent for the part which he continued to occupy during the continuance of such eviction.²

§ 197. **Surrender and merger.** — If the tenant gives up his term to the immediate reversioner, he is said to surrender his estate, and the estate is merged or becomes lost in the reversion; the effect of which is to extinguish all liability on the covenants of the lease.³ But if an estate intervenes between the two estates, neither surrender nor merger will take place.⁴ In order to prevent a merger of the term in the reversion, it is a common custom in England to have the term conveyed to trustees, and conditioned to follow the reversion into whosoever hands the latter may come. This was called a term, attendant upon the inheritance, and may be done whenever there is fear of incumbrances which will affect the reversion while they

379; *Pier v. Carr*, 69 Pa. St. 326; *Schilling v. Holmes*, 23 Cal. 230. But neither total nor partial eviction will prevent the lessor from recovering rent already due, when the eviction takes place. *Giles v. Comstock*, 4 N. Y. 270; *Kessler v. McConachy*, 1 Rawle, 435.

¹ *Morrison v. Chadwick*, 7 C. B. 283; *Chatterton v. Fox*, 5 Duer, 64; *Fitchburg v. Melvin*, 15 Mass. 268; *Boardman v. Isborn*, 23 Pick. 295; *Russell v. Fabyan*, 27 N. H. 543; *Colburn v. Morrill*, 117 Mass. 262; 19 Am. Rep. 415; *Royce v. Guggenheim*, 106 Mass. 201; 8 Am. Rep. 322; *Martin v. Martin*, 7 Md. 378; *Corning v. Gould*, 16 Wend. 538; *Smith v. Stigleman*, 58 Ill. 141.

² *Upton v. Greenlees*, 17 C. B. 30; *Fuller v. Ruby*, 10 Gray, 285; *Leishman v. White*, 1 Allen, 489; *Lawrence v. French*, 25 Wend. 443; *Christopher v. Austin*, 11 N. Y. 215; *Anderson v. Chicago Ins. Co.*, 21 Ill. 601.

³ Co. Lit. 338 a; 1 Washb. on Real Prop. 552; *Curtis v. Miller*, 17 Barb. 477; *Greider's Appeal*, 5 Pa. St. 422; *Bailey v. Wells*, 8 Wis. 158; *Smiley v. Van Winkle*, 6 Cal. 605.

⁴ 1 Washb. on Real Prop. 553; *Burton v. Barclay*, 7 Bing. 745; *Williams on Real Prop.* 413, 415.

are subject to the term.¹ Nor will merger—*i.e.*, the dissolution of the term in the reversion—take place where the two come together into the possession of one person by act of the law,—as, where the husband has a term of years in his own right, and a term of years in his wife, or tenancy by curtesy through the freehold of his wife. They will continue to exist uninfluenced by their union in the one person.³ Where two terms come together in one person, the first will merge in the second, even though the first be for a longer period, unless the second is created by way of remainder, when no merger will result. The person becoming possessed of both will have the benefit of both in succession.³

§ 198. **How surrender may be effected.**—As a general proposition, a surrender which will operate as an extinguishment of the lessee's liability for rent and on the other covenants of the lease, requires the same formalities of execution, under the Statute of Frauds, as are necessary in the creation of the lease. A lease in writing, therefore, can, as a general rule, only be terminated by a surrender in writing; and if the lease was required to be under seal, the surrender must be also.⁴ But if the lessee takes a new lease,

Williams on Real Prop. 416, 417.

² 1 Washb. on Real Prop. 554; Williams on Real Prop. 415; 3 Prest. Conv. 276; Jones v. Davies, 5 Hurlst. & N. 766; Doe v. Pett, 11 Ad. & El. 842; Clift v. White, 19 Barb. 70.

³ Co. Lit. 273 b; 3 Prest. Conv. 201; 1 Washb. on Real Prop. 553, 554; Hughes v. Robotham, Cro. Eliz. 303; Stephens v. Bridges, 6 Madd. 66. This doctrine of merger is applicable to all classes of estates, and provides for the dissolution of the inferior in the greater estate. The superiority of estates in this connection is determined by their legal value, and not their pecuniary or market value. Thus, an estate for one thousand years is less than, and becomes merged in, a life estate, when the two come together in one person.

⁴ Ward v. Lumley, 5 Hurlst. & N. 88; Hesselstine v. Seavey, 16 Me. 212; Brady v. Peiper, 1 Hilt. 61; Jackson v. Gardner, 8 Johns. 404; Allen v. Jaquish, 21 Wend. 628; M'Kinney v. Reader, 7 Watts, 123; Kiester v. Miller, 25 Pa. St. 481; Bailey v. Wells, 8 Wis. 141. But the lessee's surrender will

the enjoyment of which is incompatible with the continuance of the old lease,¹ or if the lessee abandons the possession, and the lessor actually enters into possession, or leases the premises to other parties, such acts will be sufficient to work a surrender of the premises, so far, at least, as to relieve the tenant from liability on his covenants.² But an abandonment of possession by the tenant will not work a surrender of the premises, unless it is assented to

in no wise affect the rights of third parties, such as sublessees. They will still hold their rights or interests in the estate; but after such a surrender, they must perform their covenants to the surrenderee. He can, for example, compel the sublessee to pay the rent to him. *Adams v. Goddard*, 48 Me. 212; *Beal v. Boston, etc., Car Co.*, 125 Mass. 157; 28 Am. Rep. 216; *Piggott v. Stratton*, 1 Johns. Ch. 355; *McKenzie v. Lexington*, 4 Dana, 129.

¹ *Lyon v. Reed*, 13 M. & W. 304; *McDonnell v. Pope*, 9 Hare, 705; *Shepard v. Spaulding*, 4 Metc. 416; *Brewer v. Dyer*, 7 Cush. 339; *Livingston v. Potts*, 16 Johns. 28; *Van Rensselaer v. Penniman*, 6 Wend. 569; *Coe v. Hobby*, 72 N. Y. 141; 28 Am. Rep. 120; *Bailey v. Wells*, 8 Wis. 141. And where the second lease is parol, while the first is written, the acceptance of the second will constitute a surrender of the first, if the second lease is valid under the Statute of Frauds. *Thomas v. Cook*, 2 B. & Ald. 119; *Smith v. Niver*, 2 Barb. 180; *Bedford v. Terhune*, 30 N. Y. 463. But there will be no surrender where the second lease is from one of the two original lessors (*Sperry v. Sperry*, 8 N. H. 477), or the release of the first is executed by one of the two original lessees. *Baker v. Pratt*, 15 Ill. 568.

² *Dodd v. Acklom*, 6 Mann. & G. 673; *Walker v. Richardson*, 2 M. & W. 891; *Hesseltine v. Seavey*, 16 Me. 212; *Randall v. Rich*, 11 Mass. 494; *Brewer v. Dyer*, 7 Cush. 337; *Talbot v. Whipple*, 14 Allen, 180; *Bedford v. Terhune*, 30 N. Y. 462; *Hegeman v. McArthur*, 1 E. D. Smith, 149; *Brady v. Peiper*, 1 Hilt. 61; *Baker v. Pratt*, 15 Ill. 568; *Statesbury v. Vail*, 13 N. J. L. 390; *McKinney v. Reader*, 7 Watts, 123; *Wool v. Walbridge*, 19 Barb. 136; *Van Rensselaer v. Freeman*, 6 Wend. 569; *Cline v. Black*, 4 McCord, 431; *Schniler v. Ames*, 16 Ala. 73. In *Fifty Associates v. Grace*, 125 Mass. 161 (28 Am. Rep. 218), it was held that where the lease is expressly non-assignable, and the lessor assents to an assignment and a different use of the premises, this assent, together with acceptance of rent from the assignee, is in effect the creation of a new tenancy, and the original lessee is no longer liable on his covenant for rent. See also *Bailey v. Delaplaine*, 1 Sandf. 5; *Logan v. Anderson*, 2 Dougl. (Mich.) 101; *Levering v. Langley*, 8 Minn. 107. But the mere oral agreement to substitute another in the place of the tenant will not have the effect of a surrender, unless the agreement has been carried into effect, and evidenced by some act, — such as acceptance of rent from the new tenant. See *Brewer v. Dyer*, 7 Cush. 337; *Whitney v. Myers*, 1 Duer, 266.

by the lessor, and such acceptance must be shown by word or acts,—such, for example, as entry into possession.¹ A surrender may also be made to operate *in futuro*.²

§ 199. **Right of lessee to deny lessor's title.**—As a consequence of the tenure existing between landlord and tenant, if one person accepts a lease from another, and enters into possession under the lease, he is estopped from denying the lessor's title, by setting up a title in himself or in a third person adverse to the right of the lessor to grant the original lease, in any action for the recovery of the rent, or of the possession.³ And this principle is

¹ *Thomas v. Cook*, 2 B. & Ald. 119; *Whitehead v. Clifford*, 3 Taunt. 318; *Hegeman v. McArthur*, 15 N. Y. 149; *Elliott v. Aiken*, 45 N. H. 36; *Stobie v. Dills*, 62 Ill. 432; *Matthews v. Taberner*, 39 Mo. 115; *Statesbury v. Vail*, 13 N. J. L. 390.

² *Allen v. Joquish*, 21 Wend. 628; but an acceptance of notice that the tenant is to quit at a future time, without acceptance of, or entering into, possession, when the tenant abandons the premises, is not such a surrender as will relieve the tenant from liability on his express covenant for rent. *Johnstone v. Huddleston*, 4 B. & C. 922; *Jackson v. Gardner*, 8 Johns 404; *Schiefelin v. Carpenter*, 15 Wend. 400.

³ *Cooke v. Loxley*, 5 T. R. 4; *Delaney v. Fox*, 2 C. B. (N. S.) 768; *Blight's Lessee v. Rochester*, 7 Wheat. 548; *Willison v. Warkins*, 3 Pet. 43; *Gray v. Johnson*, 14 N. H. 414; *Russell v. Fabyan*, 27 N. H. 529; *Longfellow v. Longfellow*, 54 Me. 249; *Boston v. Binney*, 11 Pick. 8; *Coburn v. Palmer*, 8 Cush. 124; *Towne v. Butterfield*, 97 Mass. 106; *Tuttle v. Reynolds*, 1 Vt. 80; *Vernam v. Smith*, 15 N. Y. 327; *People v. Stiner*, 45 Barb. 56; *Ingraham v. Baldwin*, 9 N. Y. 47; *Brown v. Dysinger*, 1 Rawle, 408; *Miller v. McBrier*, 14 Serg. & R. 382; *Bedford v. Kelly*, 69 Pa. St. 493; *Darby v. Anderson*, 1 Nott & M. 369; *Funk's Lessee v. Kincaid*, 5 Md. 404; *Terry v. Ferguson*, 8 Port. (Ala.) 500; *Pope v. Harkins*, 15 Ala. 322; *Caldwell v. Harris*, 4 Humph. 24; *Ryerson v. Eldred*, 10 Mich. 22; *Moore v. Beasley*, 3 Ohio, 294; *Hodges v. Shield*, 18 B. Mon. 830; *Hamit v. Lawrence*, 2 A. K. Marsh. 366; *Alwood v. Mansfield*, 33 Ill. 458; *McCartney v. Hunt*, 16 Ill. 76; *Parker v. Raymond*, 14 Mo. 535; *St. Louis v. Morton*, 6 Mo. 476; *Thrall v. Omaha Hotel Co.*, 5 Neb. 295; 25 Am. Rep. 488; *Tewksbury v. Magrath*, 33 Cal. 237; *Franklin v. Merida*, 35 Cal. 558. But the tenant is not estopped from setting up a tax-title purchased by him during the tenancy, unless he is under obligation to pay the taxes. *Weichelsbaum v. Carlett*, 20 Kan. 709; *Bettison v. Budd*, 17 Ark. 546; *Haskell v. Putnam*, 42 Me. 244. The mere taking of a lease does

applied to any land, the title to which the tenant may have acquired by purchase or by disseisin during the continuance of the term, and which he occupied and used in connection with the leased land, whether adjacent or at a distance, unless the presumption of holding for the benefit of the landlord is rebutted by strong and clear evidence of a contrary intention.¹

This estoppel, however, exists only during the continuance of the term, and the tenant, if he has acquired a superior title, may enforce it against the lessor, after he has delivered up possession to him at the expiration of the lease.² And during the continuance of the lease, if the tenant has been evicted by a stranger under the claim of a paramount title, the tenant may attorn to such claimant, and deny the lessor's right to recover the rent or the possession. But in order to be able to set up such a defence, he must give his lessor notice of the claim, and the eviction must be actual; although he need not wait to be actually

not estop the lessee. Entry into possession is necessary to create the estoppel. *Chattle v. Pound*, 1 Ld. Raym. 746; *Nerhath v. Althouse*, 8 Watts, 427.

¹ *Doe v. Jones*, 15 M. & W. 580; *Doe v. Rees*, 6 C. & P. 610; *Doe v. Tidbury*, 14 C. B. 304; *Kingsmill v. Millard*, 11 Exch. 313; *Dixon v. Baty*, L. R. 1 Exch. 259; *Lisburne v. Davies*, L. R. 1 C. P. 260; *Doe v. Murrell*, 8 C. & P. 134. This point does not seem to have ever been passed upon by an American court, but it is very probable that the same position would be maintained if the question comes up for adjudication.

² *Accidental Death Ins. Co. v. Mackenzie*, 10 C. B. (N. S.) 870; *Willson v. Watkins*, 3 Pet. 43; *Longfellow v. Longfellow*, 54 Me. 249; *Page v. Kinsman*, 43 N. H. 331; *Russell v. Fabyan*, 27 N. H. 529; *Greene v. Munson*, 9 Vt. 40; *Hall v. Dewey*, 10 Vt. 593; *Jackson v. Vincent*, 4 Wend. 633; *Delancey v. Ganong*, 9 N. Y. 9; *Sharpe v. Kelly*, 5 Denio, 431; *Porter v. Mayfield*, 21 Pa. St. 264; *Elliott v. Smith*, 23 Pa. St. 131; *Shields v. Lozear*, 24 N. J. L. 496; *Wilson v. Weathersby*, 1 Nott & M. 373; *Williams v. Garrison*, 29 Ga. 503; *Doe v. Reynolds*, 27 Ala. 276; *Russell v. Erwin*, 23 Ala. 50; *Wilson v. Smith*, 5 Yerg. 379; *Duke v. Harper*, 6 Yerg. 280; *Brown v. Keller*, 32 Ill. 156; *Wall v. Goodenough*, 16 Ill. 416; *Hodges v. Shields*, 18 B. Mon. 832; *Deane v. Gregory*, 3 B. Mon. 619; *Stout v. Merrill*, 35 Iowa, 47. And disclaimer of tenancy, with abandonment of possession, will have the same effect. *Fuller v. Sweet*, 30 Mich. 237; 18 Am. Rep. 122.

put out of possession before attorning to the stranger claimant.¹ He may also show that the lessor's title has since been determined, and that he has acquired the title to the reversion, although such determination of the lessor's title is not a good defence, if the reversion is held by a stranger, unless he has been actually or constructively evicted.² He may also show that he has been induced to accept the lease through misrepresentation or fraud, or that the lessor was not in possession at the creation of the lease.³

The same doctrine of estoppel applies to the assignees, devisees and heirs of the lessor. The lessee cannot dispute the title of the original lessor, but he may deny the validity of the assignment, the devise, or the descent.⁴ And in case

¹ *Mayor v. Whitt*, 5 M. & W. 571; *Simers v. Salters*, 3 Denio, 214; *Whalin v. White*, 25 N. Y. 465; *Morse v. Goddard*, 13 Metc. 177; *George v. Putney*, 4 Cush. 354; *Hilbourne v. Fogg*, 99 Mass. 1; *Towne v. Butterfield*, 100 Mass. 189; *Ryers v. Farwell*, 9 Barb. 615; *Lawrence v. Miller*, 1 Sandf. 576; *Stewart v. Roderick*, 4 Watts & S. 188; *Shields v. Lozeur*, 34 N. J. L. 496; *Perrin v. Calhoun*, 2 Brev. 248; *Devacht v. Newsam*, 3 Ohio, 57; *Lowe v. Emerson*, 48 Ill. 160; *Bailey v. Moore*, 21 Ill. 165; *Casey v. Gregory*, 13 B. Mon. 506; *Lunsford v. Turner*, 5 J. J. Marsh. 104; *Wheelock v. Warschauer*, 21 Cal. 216.

² *Walton v. Waterhouse*, 2 Saund. 418 n; *Stack v. Seaton*, 26 Mann. & R. 729; *Jackson v. Rowland*, 6 Wend. 666; *Despard v. Wallbridge*, 1 E. D. Smith, 374; *Hoag v. Hoag*, 35 N. Y. 471; *George v. Putney*, 4 Cush. 355; *Hilbourn v. Fogg*, 99 Mass. 11; *Lamson v. Clarkson*, 113 Mass. 348; 18 Am. Rep. 498; *Kimball v. Lockwood*, 6 R. I. 138; *Pierce v. Brown*, 124 Vt. 105; *Duffer v. Wilson*, 69 Pa. St. 316; *Elliott v. Smith*, 23 Pa. St. 131; *Shields v. Lozeur*, 34 N. J. L. 496; *Giles v. Ebsworth*, 10 Md. 333; *Stout v. Merrill*, 35 Iowa, 47; *Tewksbury v. Magraff*, 33 Cal. 237; *Franklin v. Palmer*, 50 Ill. 202; *Tilghman v. Little*, 13 Ill. 241; *Pope v. Haskins*, 16 Ala. 323; *Camley v. Stanfield*, 10 Tex. 546; *Wild's Lessee v. Serpell*, 10 Gratt. 415; *Magill v. Hinsdale*, 6 Conn. 46; *Horner v. Leeds*, 25 N. J. L. 106; *Stedman v. Gassett*, 18 Vt. 346; *Wolf v. Johnson*, 30 Miss. 513; *Beall v. Davenport*, 48 Ga. 165; 15 Am. Rep. 656.

³ *Accidental Death Ins. Co. v. McKenzie*, 10 C. B. (n. s.) 871; *Clee v. Seaman*, 21 Mich. 297; *Franklin v. Merida*, 35 Cal. 558; *Tewksbury v. Magraff*, 33 Cal. 237; *Jackson v. Spear*, 7 Wend. 401; *Alderson v. Miller*, 15 Gratt. 279; *Hockenbury v. Snyder*, 2 Watts & S. 240; *Thayer v. Society*, etc., 20 Pa. St. 60; *Miller v. Bonsadon*, 9 Ala. 317; *Tison v. Yawn*, 15 Ga. 491.

⁴ *Tuttle v. Reynolds*, 1 Vt. 80; *Russell v. Allard*, 18 N. H. 225; *Despard*

of assignment, he may dispute the original lessor's present title, by setting up the title of the assignee to whom he has attorned.¹

§ 200. **Effect of disclaimer of lessor's title.**—If the lessee illegally denies the lessor's title to the land, it is virtually an act of disseisin. But it will not work a rupture of the relation of landlord and tenant except at the option of the lessor. If he so elects, he may consider the lease as forfeited, and treat the lessee as a disseisor. Otherwise the relation of landlord and tenant continues, with all the attending liabilities and duties.² The Statute of Limitations will not run against the lessor's title, until due notice has been given to the lessor of the claim of adverse possession, and will ripen into a good title only when the lessor fails within the statutory period to exercise the rights of an owner over the land. The payment of rent, whether voluntary or involuntary, will be a sufficient acknowledgment of the tenure and the lessor's title to prevent its being barred by the Statute of Limitations.³

v. Smith, 15 N. Y. 377; *Blantin v. Whitaker*, 11 Humph. 313; *Funk's Lessee v. Kincaid*, 5 Md. 404; *Beall v. Davenport*, 48 Ga. 155; 15 Am. Rep. 656.

¹ *Delaney v. Fox*, 2 C. B. (N. S.) 778; *Stedman v. Gassett*, 18 Vt. 346; *Kimball v. Lockwood*, 6 R. I. 138; *Mass. Ins. Co. v. Wilson*, 10 Metc. 126; *Welch v. Adams*, 1 Metc. 494; *Magill v. Hinsdale*, 6 Conn. 464; *Pierce v. Brown*, 24 Vt. 165; *Pope v. Haskins*, 16 Ala. 323; *Beall v. Davenport*, 48 Ga. 165; 15 Am. Rep. 656.

² *Sherman v. Champlain Transp. Co.*, 31 Vt. 110; *Greene v. Munson*, 9 Vt. 37; *Jackson v. Vincent*, 4 Wend. 633; *Delancey v. Ganong*, 9 N. Y. 9; *Jackson v. Collins*, 11 Johns. 5; *Stearns v. Godfrey*, 15 Me. 148; *Russell v. Fabyan*, 34 N. H. 223; *Newman v. Rutter*, 8 Watts, 5; *Wild's Lessee v. Serpell*, 10 Gratt. 405; *Wadsworthville School v. Meetze*, 4 Rich. 50; *Doe v. Reynolds*, 27 Ala. 376; *Montgomery v. Craig*, 3 Dana, 101; *Fusselman v. Worthington*, 14 Ill. 135.

³ *Willison v. Watkins*, 3 Pet. 49; *Zeller v. Eckhart*, 4 How. 289; *Greene v. Munson*, 9 Vt. 37; *Sherman v. Champlain Transp. Co.*, 31 Vt. 110; *Bedford v. McElheron*, 2 Serg. & R. 49; *McGinnis v. Porter*, 20 Pa. St. 80; *Colvin v. Warford*, 20 Md. 396; *Jackson v. Wheeler*, 6 Johns. 272; *Whaley v. Whaley*, 1 Speers, 225; *Deane v. Gregory*, 3 B. Mon. 619; *Lee v. Netherton*, 9 Yerg. 315; *Duke v. Harper*, 6 Yerg. 280.

§ 201. **Letting land upon shares.** — It is quite common in this country for the owner of land to let it to persons for the purpose of cultivating it, with the agreement that the parties should each have a share in the crops. Such contracts create between the parties different relations according to their intentions, as expressed in their agreements. If the intention appears to be, that the land-owner shall lease the land to the former, and that his share of the crop shall be received in *lieu* of, or as, rent, the relation of landlord and tenant is created. The tenant is in possession of the land, and the landlord has no vested interest in the crop, as a crop. His rights in, or to, any part of the crop attach only upon a division and delivery of the same.¹ But, if one is employed to work a farm, with the understanding that the crop shall be divided between him and the land-owner, and there is no apparent intention of leasing the lands and taking the share for rent, the farmer has no estate in the land beyond a license to go upon it for the purposes of cultivation; the land-owner is in possession of the land, and must maintain all suits for trespass and other injuries to the land. The parties are tenants in common of the crop to the amount of their respective shares, from the time of planting until a division and settlement is made.² It is very

¹ *Aiken v. Smith*, 21 Vt. 181; *Caswell v. Districh*, 15 Wend. 379; *Herskell v. Bushnell*, 37 Conn. 43; *Burns v. Cooper*, 31 Pa. St. 420; *Rinehart v. Olwine*, 5 Watts & S. 457; *Dockham v. Parker*, 9 Mo. 137; *Butterfield v. Baker*, 5 Pick. 522; *Munsell v. Carew*, 2 Cush. 50; *Newcomb v. Ramer*, 2 Johns. 421; *Hatchell v. Kinsbrough*, 4 Jones (N. C.), 163; *Hoskins v. Rhodes*, 1 Gill & J. 266; *Ross v. Swaringer*, 9 Ired. 481; *Alwood v. Ruckman*, 21 Ill. 200; *Dixon v. Niccolls*, 39 Ill. 384; *Wells v. Preston*, 25 Cal. 39; *Blake v. Coats*, 3 Greene (Iowa), 548. And until division, they may be attached by creditors as the property of the lessee. *Kelly v. Weston*, 20 Me. 232; *Deaver v. Rice*, 4 Dev. & B. 431; *Ross v. Swaringer*, 9 Ired. 481.

² *Tanner v. Hills*, 48 N. Y. 362; *Bradish v. Schenck*, 8 Johns. 151; *Putnan v. Wisc*, 1 Hill, 234; *Foot v. Colvin*, 3 Johns. 216; *Chandler v. Thurston*, 10 Pick. 205; *Daniels v. Brown*, 34 N. H. 454; *Moulton v. Robinson*, 27 N. H. 550; *Aiken v. Smith*, 21 Vt. 181; *Esdon v. Colburn*, 28 Vt. 631; *Jordan v. Staples*, 57 Me. 455; *Guest v. Opdyke*, 30 N. J. L. 554; *Steel v. Frick*, 56

often difficult to determine which of these relations such a contract creates. The only guide is the intention of the parties, and no general rules can be given except those above presented.

Pa. St. 172; *Ferrall v. Kent*, 4 Gill, 209; *Lowe v. Miller*, 3 Gratt. 205; *Moore v. Spruill*, 13 Ired. 55; *Alwood v. Ruckman*, 21 Ill. 200; *Creel v. Kirkham*, 47 Ill. 344; *Williams v. Nolen*, 34 Ala. 167; *Fiquet v. Allison*, 12 Mich. 330; *Walker v. Fitts*, 24 Pick. 191; *Delaney v. Root*, 99 Mass. 550; *Smyth v. Tankersley*, 20 Ala. 212; *Walls v. Preston*, 25 Cal. 59. The tenant may in such a case assign his interest in the crop. *Aiken v. Smith*, 21 Vt. 182. But see *Kelly v. Watson*, 20 Me. 232; *Brown v. Lincoln*, 47 N. H. 469; *Harris v. Frink*, 49 N. Y. 31. In *Jeter v. Penn* (28 La. An. 230; 26 Am. Rep.), it was held that the relation of the parties was not a partnership; that the tenant was merely an employee, and can be discharged for cause. He cannot delegate his employment.

SECTION II.

ESTATES AT WILL AND TENANCIES FROM YEAR TO YEAR.

SECTION 212. Estates at will.

213. How estates at will may be determined.

214. Estates at will distinguished from tenancy from year to year.

215. Tenancy at will — What now included under that term.

216. Tenancy at will — Arising by implication of law.

217. Qualities of tenancies from year to year

218. What notice is required to determine tenancy from year to year.

219. How notice may be waived.

§ 212. **Estates at will.** — Estates at will are those estates which are determinable at the will of either party, and arise only upon actual possession being taken by the tenant.¹ The tenant at will has no interest in the land which he can convey to others. The relation and tenure of landlord and tenant exist between the original parties to the demise, but it does not pass to the tenant's assignee. The landlord may treat such assignee as a disseisor, unless he accepts rent accruing subsequent to the assignment. By acceptance of rent the assignment would be confirmed, and the assignee recognized as tenant.² The estate of the lessor of a tenant at will is not strictly a reversion, for the interest of the tenant is "a mere scintilla of interest, which a landlord may determine by making a feoffment upon the land with livery, or by a demand of possession." A remainder cannot be limited upon an estate at will.³

¹ Co. Lit. 55 a, 57 a; 1 Washb. on Real Prop. 581; 2 Prest. Abst. 26; Pollock v. Kittrell, 2 Tayl. 152.

² Co. Lit. 57 a; 1 Washb. on Real Prop. 582; *Cunningham v. Houlton*, 55 Me. 33; *Cunningham v. Horton*, 57 Me. 422; *King v. Lawson*, 98 Mass. 309; *Hilbourn v. Fogg*, 99 Mass. 12; *Holbrook v. Young*, 103 Mass. 85; *Reckhow v. Sehanck*, 43 N. Y. 448.

³ 1 Washb. on Real Prop. 584; *Ball v. Cullimore*, 2 Crompt. M. & R. 120.

The tenant, however, is entitled to estovers, and also to emblements, when the tenancy is determined by the landlord.¹ And he will also be liable in damages for the commission of waste, although the technical action of waste might not lie.²

§ 213. **How estates at will may be determined.** — An estate at will may be determined by any act of either party which indicates an intention to put an end to the tenancy, or which is inconsistent with the continuance of the relation of landlord and tenant.³ The death of either party determines the estate. If the lessor dies, the estate becomes a tenancy at sufferance, and the lessee's personal representatives, in case of his death, have no right to possession under the tenancy.⁴ The tenancy will, however, survive, if only one of two or more lessees dies.⁵ Any assignment or conveyance of the reversion, whether voluntary or involuntary, will destroy the tenancy.⁶ The assignment or conveyance by the tenant will have the same effect, as soon as the landlord has received notice of it. Until notice,

¹ Co. Lit. 55 b; Washb. on Real Prop. 584; *Davis v. Thompson*, 13 Me. 209; *Brown v. Thurston*, 56 Me. 126.

² Co. Lit. 57 a; *Campbell v. Proctor*, 6 Me. 12; *Daniels v. Pond*, 21 Pick. 369; *Phillips v. Covert*, 7 Johns. 1.

³ *Turner v. Doe*, 9 M. & W. 648; *Doe v. Prince*, 9 Bing. 356; *Walden v. Bodley*, 14 Pet. 162; *Davis v. Thompson*, 13 Me. 209; *Esty v. Baker*, 50 Me. 325; *Moore v. Boyd*, 24 Me. 242; *Rising v. Stannard*, 17 Mass. 281; *Curl v. Lowell*, 19 Pick. 25; *Pratt v. Farrar*, 10 Allen, 519; *Clark v. Wheelock*, 99 Mass. 15; *Alton v. Pickering*, 9 N. H. 494; *Holly v. Brown*, 14 Conn. 255; *Jackson v. Aldrich*, 13 Johns. 66; *Den v. Howell*, 7 Ired. 496; *Hildreth v. Conant*, 10 Metc. 298; *Curtis v. Galvin*, 1 Allen, 215.

⁴ *James v. Dean*, 11 Ves. 391; *Morton v. Woods*, L. R. 4 Q. B. 306; *Reed v. Reed*, 48 Me. 388; *Robie v. Smith*, 21 Me. 114; *Howard v. Merriam*, 5 Cush. 563; *Ferrin v. Kenney*, 10 Metc. 294; *Cody v. Quaterman*, 12 Ga. 386; *Manchester v. Doddridge*, 3 Ind. 360.

⁵ 1 Washb. on Real Prop. 586; Co. Lit. 55 b.

⁶ *Doe v. Thompson*, 6 Eng. Law & Eq. 487; *Hill v. Jordan*, 30 Me. 367; *Morse v. Goddard*, 13 Metc. 177; *Howard v. Merriam*, 5 Cush. 563; *Stedman v. Gassett*, 18 Vt. 346; *Hemphill v. Tevis*, 4 Watts & S. 535.

the landlord may continue to treat the lessee as his tenant.¹ The estate at will in the cases above enumerated would be wholly determined, immediately upon the commission of the act, or occurrence of the event. But the tenant is allowed a reasonable time thereafter, within which to move his effects from the premises; and where he is entitled to emblements, he may still enter upon the land for the purpose of cultivating and harvesting the crops.² No notice to quit is ever required to determine the estate at will; this was the early common-law rule, and still obtains as an invariable incident of estates strictly at will.³

§ 214. **Estate at will distinguished from tenancy from year to year.**—In consequence of the many hardships resulting from the uncertain tenure of estates at will, and the too often arbitrary and sudden determination of them by lessors, it became at an early day a rule of law that, where rent was reserved and paid by the lessee, the lessor could

¹ Co. Lit. 57 a; *Pinhorn v. Souster*, 20 Eng. Law & Eq. 501; *Kelly v. Waite*, 12 Metc. 300; *Cooper v. Adams*, 6 Cush. 87; *Sprague v. Quin*, 108 Mass. 554; *Cole v. Lake Co.*, 54 N. H. 277; *Den v. Howell*, 7 Ired. 496. The tenancy may also be determined by the tenant's disclaimer of holding under his lessor. *Woodward v. Brown*, 13 Pet. 1; *Bennock v. Whipple*, 12 Me. 346; *Russell v. Fabyan*, 34 N. H. 223; *Towne v. Butterfield*, 99 Mass. 105; *Boston v. Binney*, 11 Pick. 1; *Chamberlin v. Donahoe*, 45 Vt. 55; *Sharpe v. Kelly*, 5 Denio, 431; *Harrison v. Middleton*, 11 Gratt. 527; *Duke v. Harper*, 6 Yerg. 280; *Farrow v. Edmundson*, 4 B. Mon. 605; *Fusselman v. Worthington*, 14 Ill. 135; *Sampson v. Schaeffer*, 3 Cal. 196.

² Co. Lit. 56 b; *Doe v. McKaeg*, 10 B. & C. 721; *Turner v. Doe*, 9 M. & W. 647; *Ellis v. Paige*, 1 Pick. 43; *Rising v. Stannard*, 17 Mass. 282.

³ *Hall v. Burgess*, 5 B. & C. 332; *Elliott v. Stone*, 1 Gray, 571; *Stone v. Sprague*, 20 Barb. 509; *Ingraham v. Baldwin*, 9 N. Y. 46; *Chilton v. Niblett*, 3 Humph. 404; *Brown v. Keller*, 32 Ill. 152. No notice is required where the tenancy is determined by the tortious acts of the tenant. *Larned v. Clark*, 8 Cush. 29; *Tuttle v. Reynolds*, 1 Vt. 80; *Jackson v. Deyo*, 3 Johns. 422; *Ross v. Garrison*, 1 Dana, 35; *Clemens v. Bromfield*, 19 Mo. 118. And, likewise, there is no notice required where the tenancy at will is an estate upon condition or limitation, and the condition is broken, or the limitation expires. *Elliott v. Stone*, 1 Gray, 575; *Ashley v. Warner*, 11 Gray, 45; *Bolton v. Landers*, 27 Cal. 105.

not terminate the tenancy without giving due notice of his intention to do so. Tenancies at will, where no rent was reserved, could be terminated immediately upon notice.¹ And it was obviously equitable that, in the institution of such a rule, notice to the lessor should be required in case the tenant should wish to determine the estate.² In this way, by a course of judicial legislation, arose a class of estates which are for an uncertain period, but which differ from the common-law estates at will, in that they are tenancies for an uncertain number of fixed periods of time, their duration being regulated by the manner of paying the rent, *i.e.*, by the month, quarter or year, and which continue to exist as long as the required notice to quit is not given. These estates are called tenancies from year to year.³ The tests by which it is determined whether an estate for an uncertain period is a tenancy from year to year, and not one at will, are the reservation of rent and the necessity of giving notice in order to determine the tenancy. If the rent is reserved, and notice to quit is required, it is a ten-

¹ 1 Washb. on Real Prop. 583, 586, 597; *Dame v. Dame*, 38 N. H. 429; *Doe v. Watts*, 1 T. R. 83; *Doe v. Porter*, 3 T. R. 13; *Kingsbury v. Collins*, 4 Bing. (13 E. C. L. R.) 202; *Izon v. Gorton*, 5 Bing. N. C. (35 E. C. L. R.) 501.

² *Kightly v. Bulkly*, Sid. 338; *Bessell v. Landsberg*, 7 Ad. & E. 638; *Johnstone v. Huddlestone*, 4 Barn. & Cress. 923; *Cooke v. Neilson*, 10 Burr. 41; *Pugsley v. Aikin*, 11 N. Y. 494; *Currie v. Perley*, 24 N. H. 225; *Hall v. Wadsworth*, 28 Vt. 410; *Morehead v. Watkins*, 5 B. Mon. 228.

³ *Right v. Darby*, 1 T. R. 159; *Hamerton v. Stead*, 3 B. & C. 478; *Hall v. Wadsworth*, 28 Vt. 410; *Lockwood v. Lockwood*, 22 Conn. 425; *McDowell v. Simpson*, 3 Watts, 129; *Lesley v. Randolph*, 4 Rawle, 123; *Jackson v. Salmon*, 4 Wend. 327; *Webber v. Shearman*, 3 Hill, 547; *Pugsley v. Aikin*, 11 N. Y. 494; *Patton v. Axley*, 5 Jones L. 440; *Crommelin v. Thiess*, 31 Ala. 419; *Hunt v. Morton*, 18 Ill. 75; *Squires v. Huff*, 3 A. K. Marsh. 17; *Den v. Drake*, 14 N. J. L. 523; *Godard v. Railroad Co.*, 2 Rich. L. 346; *Ridgley v. Stillwell*, 28 Mo. 400. A definite tenancy for one year is not a tenancy from year to year, and does not require any notice to quit. *Cobb v. Stokes*, 8 East, 358; *Preble v. Hay*, 32 Me. 456; *Dorrill v. Johnson*, 17 Pick. 263; *Allen v. Jacquish*, 21 Wend. 623; *Jackson v. McLeod*, 12 Johns. 182; *Den v. Adams*, 12 N. J. L. 99; *Lesley v. Randolph*, 4 Rawle, 125; *Logan v. Herron*, 8 Serg. & R. 459; *Walker v. Ellis*, 12 Ill. 470.

ancy from year to year, and the length of the fixed, indeterminate period of the tenancy is governed by the time of paying the rent.¹ But it is always within the power of the parties, by express agreement to give to the estate the characteristics of a tenancy at will, even though the rent is reserved. And if in such a case the tenancy is determined by the lessor between the interval of payment of the rent, the landlord can only recover rent accruing up to the last pay-day.² The term “year” in the tenancy from year to year is here used as a unit of time, and under the term *tenancy from year to year* are included tenancies from month to month, quarter to quarter, and the like, in the same manner as an estate for years includes an estate for one month.³ Mr. Washburn seems to exclude these estates from the tenancies from year to year, and calls them tenancies at will, in which notice to quit is required.⁴ There is no necessity for this distinction, and the classification here employed seems to bring out more prominently the distinctive features of estates at will, and tenancies from year to year.

§ 215. Tenancy at will — What now included under that

¹ Richardson v. Landgridge, 4 Taunt. 128; Doidge v. Bowers, 2 M. & W. 365; Rich v. Bolton, 43 Vt. 84; 14 Am. Rep. 615; Lockwood v. Lockwood, 22 Conn. 425; Jackson v. Bradt, 2 Caines, 169; McDowell v. Simpson, 3 Watts, 129; Doe v. Baker, 4 Dev. 220; Crommelin v. Thiess, 31 Ala. 419; Hunt v. Morton, 18 Ill. 75; Williams v. Deriar, 31 Mo. 1. In Maine and Massachusetts the doctrine of tenancies from year to year has never been adopted; and although notice is now required to determine those tenancies which, in other States, would come under the name of tenancies from year to year, they are not recognized there as having the characteristics of durability, which are given to them elsewhere. See Moore v. Boyd, 24 Me. 242; Withers v. Larrabee, 48 Me. 513; Rising v. Stinnard, 17 Mass. 282; Furlong v. Leary, 8 Cush. 409; Walker v. Furbush, 11 Cush. 366; Bunton v. Richardson, 10 Allen, 260; Hilbourn v. Foggy, 99 Mass. 1.

² Richardson v. Landgridge, 4 Taunt. 128; Doe v. Cox, 11 Q. B. 122; Cameron v. Little, 62 Me. 550; Elliott v. Stone, 1 Gray, 571; Harrison v. Middleton, 11 Gratt. 527; Sullivan v. Enders, 3 Dana, 66.

³ See Anderson v. Prindle, 23 Wend. 610.

⁴ 1 Washb. on Real Prop. 598, 599, 610.

term. — As the law now stands, an express tenancy at will can only arise under two circumstances: *first*, where land is leased for an indefinite period, and no rent is reserved for its use and occupation,¹ and, *secondly*, where there is rent reserved, and, by the express agreement of the parties, the tenancy is to have the characteristics of a tenancy at will. Parties may agree to waive the right to notice.²

§ 216. Tenancy at will—Arising by implication of law.—When a tenant enters upon the land for some other purpose than to create the relation of landlord and tenant, and his entry is under, and in pursuance of, a grant to him of a larger and more definite interest, until such interest is vested in him, the law treats and considers his possession as that of a tenant at will. Such would be the case where one is permitted to enter into possession under a contract for the purchase of the land, or for a future lease of the same.³ The tenant would not be liable for rent for the time he has occupied the land, unless there is an express agreement to

¹ *Richardson v. Landgridge*, 4 Taunt. 128; *Doe v. Wood*, 14 M. & W. 682; *Garrard v. Tuck*, 8 C. B. 231; *Rex v. Collett*, 1 Russ. & Ry. 498; *Melling v. Leak*, 16 C. B. 652; *Gould v. Thompson*, 4 Metc. 224; *Jackson v. Pierce*, 2 Johns. 226; *Bedford v. Terhune*, 30 N. Y. 465; *Matthews v. Ward*, 10 Gill & J. 456. And where tenant is in possession without agreement as to paying rent or the length of his holding, and he refuses to pay rent, the tenancy is strictly one at will, although he has been in possession fourteen years, and the six months' notice required in cases of tenancies from year to year is not necessary to terminate his tenancy. *Rich v. Bolton*, 46 Vt. 84; 14 Am. Rep. 315; *Dunne v. Trustees, etc.*, 36 Ill. 518.

² *Richardson v. Landgridge*, 4 Taunt. 128; *Doe v. Davies*, 7 Exch. 89; *Cudlip v. Randall*, 4 Modern, 9; *Harrison v. Middleton*, 11 Gratt. 527; *Humphries v. Humphries*, 3 Ired. 362; *Sullivan v. Enders*, 3 Dana, 56.

³ *Hamerton v. Stead*, 3 Barn. & Cress. 478; *Howard v. Shaw*, 8 M. & W. 118; *Doe v. Chamberlain*, 5 M. & W. 14; *Gould v. Thompson*, 4 Metc. 224; *White v. Livingston*, 10 Cush. 589; *Silsby v. Allen*, 43 Vt. 177; *Jackson v. Miller*, 7 Cow. 747; *Jackson v. Bradt*, 2 Caines, 169; *Harris v. Frink*, 49 N. Y. 32; *Freeman v. Headley*, 33 N. J. L. 523; *Den v. Edmondston*, 1 Ired. 152; *Jones v. Jones*, 2 Rich. 542; *Carson v. Baker*, 4 Dev. 220; *Danne v. Trustees*, 39 Ill. 583; *Dean v. Comstock*, 32 Ill. 180; *Glascocock v. Robards*, 14 Mo. 350; *Manchester v. Doddridge*, 3 Ind. 360; *Cole v. Gill*, 14 Iowa, 529.

that effect.¹ But he will render himself liable for rent, if he retains possession after the executory contract, under which he entered, has come to an end. And he will also be liable in an action for damages for use and occupation during the pendency of the contract, if the failure of such contract is the result of his own refusal or inability to fulfil his obligations under it.² The rent is recovered in such a case, not on any implied contract to pay for the use and occupation in the event that the tenant fails to perform his part of the contract, but on the theory that, his possession being given with a view to the tenant's performance of the contract, his failure to perform makes his holding a trespass *ab initio*; or the rent may be asked for as damages suffered from the tenant's breach of the contract of sale.³ In a similar manner is the vendor liable as tenant at will for use and occupation, if he retains possession of the land, after the contract of purchase has been executed and the deed of conveyance delivered. If the vendor retains possession, with consent of the vendee, the action will be on an implied contract for rent, while he would be liable in trespass for

¹ Winterbottom v. Ingham, 7 Q. B. 611; Howard v. Shaw, 8 M. & W. 118; Dennett v. Penobscot Company, 57 Me. 425; Cunningham v. Holton, 55 Me. 33; Woodbury v. Woodbury, 47 N. H. 11; Hough v. Birge, 11 Vt. 190; Little v. Pearson, 7 Pick. 301; Dakin v. Allen, 8 Cush. 33; Vanderheuevel v. Storrs, 3 Conn. 203; Sylvester v. Ralston, 31 Barb. 286; Doolittle v. Eddy, 7 Barb. 74; Hasle v. McCoy, 7 J. J. Marsh. 319; Bell v. Ellis, 1 Stew. & P. 294; McKillsack v. Bullington, 87 Miss. 535; Coffman v. Huck, 24 Mo. 496.

² Howard v. Shaw, 8 M. & W. 118; Tancred v. Christy, 12 M. & W. 324; Gould v. Thompson, 4 Metc. 228; Clough v. Hosford, 6 N. H. 231; Hall v. West. Transp. Co., 34 N. Y. 291; Dwight v. Cutler, 3 Mich. 566; Hogsett v. Ellis, 17 Mich. 367; Wright v. Roberts, 22 Wis. 161; Pinero v. Judson, 6 Bing. 206.

³ Burdett v. Caldwell, 9 Wall. 293; Chamberlain v. Donahue, 44 Vt. 59; Clough v. Hosford, 6 N. H. 231; Kistland v. Pounsett, 2 Taunt. 145; Bancroft v. Wardwell, 13 Johns. 489; Smith v. Stewart, 6 Johns. 46; Vanderheuevel v. Storrs, 3 Conn. 203; Bell v. Ellis, 1 Stew. & P. 204; Brewer v. Conover, 13 N. J. L. 215; Johnson v. Beauchamp, 9 Dana, 124. But see Forbes v. Smiley, 56 Me. 174; Boston v. Binney, 11 Pick. 9; Gould v. Thompson, 4 Metc. 228; Hull v. Vaughan, 6 Price, 157.

damages, if such holding was without the permission of the grantee.¹

§ 217. **Qualities of tenancies from year to year.** — As a consequence of the rule requiring a certain notice of the intention to terminate the estate, before such termination can take place, the tenant was held to be possessed of a fixed and indefeasible estate for a definite period, the length of which is controlled by the character and the terms of the contract for rent (if it be a yearly rental, this estate is for one year, and if the rental be monthly, it is for one month), together with an indefinite obligation to continue the relation of landlord and tenant, until it is determined by the proper notice from either of the parties.² The tenant's estate survives the death of the tenant and goes to his personal representatives. It is also capable of assignment,³ and the tenant may maintain his action for trespass *quare clausum fregit* against all intruders, including the landlord.⁴ Nor is it determined by the grant of the reversion by the lessor. In other words, the estate of the tenant from year to year cannot be determined, nor can the tenant relieve himself from liability for rent, except by giving a notice, having the requisites both as to length and the time of giving it, of his intention to determine the tenancy.

¹ *Tew v. Jones*, 13 M. & W. 14; *Carrier v. Earl*, 13 Me. 216; *Nichols v. Williams*, 8 Cow. 13.

² *Hamerton v. Stead*, 3 B. & C. 478; *Roe v. Lees*, 2 W. Bl. 1173; *Rich v. Bolton*, 46 Vt. 84; 14 Am. Rep. 615; *Lockwood v. Lockwood*, 22 Conn. 425; *Jackson v. Bradt*, 2 Caines, 169; *The People v. Darling*, 47 N. Y. 666; *Lesley v. Randolph*, 4 Rawle, 123; 4 Dev. 220; *Williams v. Deriar*, 31 Mo. 1; *Secor v. Pestana*, 35 Ill. 528.

³ *Doe v. Porter*, 3 T. R. 13; *Batting v. Martin*, 1 Camp. 317; *Cody v. Quarterman*, 12 Ga. 386; *Pugsley v. Aikin*, 11 N. Y. 494; 1 Washb. on Real Prop. 604; 2 Prest. Abst. 25. See *Morton v. Woods*, L. R. 4 Q. B. 306; *Witt v. Mayor of New York*, 6 Robt. 447.

⁴ *Moore v. Boyd*, 25 Me. 242; *Cunningham v. Holton*, 55 Me. 33; *Dickinson v. Godspeed*, 8 Cush. 119; *French v. Fuller*, 23 Pick. 107; *Clark v. Smith*, 25 Pa. St. 437; *Cunningham v. Horton*, 57 Me. 422.

§ 218. **What notice is required to determine tenancy from year to year.** — The length of time required to be observed in giving notice is regulated by statute, and generally varies with the length of the periods between the payments of rent. If it be a yearly rental, the English rule, which is followed in some of the States, requires six months' notice;¹ while in some other States, a shorter time, usually three months, is required.² If the rental be for a period less than one year, as by the quarter, the month, etc., then, as a general rule, the notice must be for as long a time as the periods of payment.³ The notice must not only be given for a certain length of time before the estate is to terminate, but the estate can only be determined at the expiration of the time during which the tenant may lawfully hold, *i.e.*, at the end of each rental period; it can only be determined at the end of the year, quarter, or month, according as the tenancy is respectively a yearly, quarterly, or monthly rental.⁴ This notice must be sufficiently clear in its terms as to the time when the tenancy is to expire;⁵

¹ *Doe v. Watts*, 7 T. R. 83; *Bessell v. Landsberg*, 7 Q. B. 638; *Barlow v. Wainwright*, 22 Vt. 88; *Jackson v. Bryan*, 1 Johns. 322; *Den v. Drake*, 14 N. J. L. 523; *Den v. McIntosh*, 4 Ired. 291; *Moorehead v. Watkins*, 5 B. Mon. 228; *Trousdale v. Darnell*, 6 Yerg. 431; *Hunt v. Morton*, 18 Ill. 75. But see *Secor v. Pestana*, 35 Ill. 528.

² *Currier v. Perley*, 24 N. Y. 219; *Logan v. Herron*, 8 Serg. & R. 459; *Floyd v. Floyd*, 4 Rich. 23.

³ 1 Washb. on Real Prop. 610; *Taylor's L. & T.* 50; *Doe v. Hazell*, 1 Esp. 94; *Sanford v. Harney*, 11 Cush. 93; *Hanchet v. Whitney*, 1 Vt. 311; *Cunningham v. Horton*, 57 Me. 422; *Burns v. Bryant*, 31 N. Y. 453; *Lloyd v. Cozens*, 2 Ashm. 131; *Godard v. S. C. R. R.*, 2 Rich. 346; *Secor v. Pestana*, 35 Ill. 528.

⁴ *Doe v. Morphett*, 7 Q. B. 577; *Cunningham v. Holton*, 55 Me. 33; *Hanchet v. Whitney*, 1 Vt. 311; *Currier v. Barker*, 2 Gray, 224; *Sanford v. Harvey*, 11 Cush. 93; *Oakes v. Monroe*, 8 Cush. 285; *Burns v. Bryant*, 31 N. Y. 453; *Godard v. S. C. R. R.*, 2 Rich. 346; *Lloyd v. Cozens*, 2 Ashm. 131; *Waters v. Young*, 11 R. I. 1; 23 Am. Rep. 409; *Steffens v. Earl*, 40 N. J. L. 128; 29 Am. Rep. 214; *Woodrow v. Michael*, 13 Mich. 190.

⁵ *Mills v. Goff*, 14 M. & W. 72; *Hanchet v. Whitney*, 1 Vt. 311; *Currier v. Barker*, 2 Gray, 224; *Huyser v. Chase*, 13 Mich. 102; *Woodrow v. Michael*,

and must, as a general rule, be served upon the tenant personally, although it may be left at the tenant's dwelling-house, with a servant or other person of discretionary age, who appears to be in charge of the premises.¹

§ 219. **How notice may be waived.** — Such notice, when it fulfils all the requirements of the law, puts an end to the tenancy, unless the landlord accepts rent accruing after the expiration of the notice. Such acceptance of rent will generally constitute a waiver of the notice, and the tenancy becomes re-established.² But in all such cases it is a matter depending upon the intention of the parties, and the receipt of such rent is open to explanation, and the evidence is admissible to show that the landlord had no intention of waiving the notice, provided the tenant also had knowledge of that fact.³

Ibid. 190; *Granger v. Brown*, 11 Cush. 191; *Doe v. Morphet*, 7 Q. B. 577; *Doe v. Smith*, 5 A. & E. 350; *Doe v. Wilkinson*, 12 A. & E. 743.

¹ *Doe v. Dunbar*, 1 Mood. & M. 10; *Jones v. Marsh*, 464; *Hatstat v. Packard*, 7 Cush. 245; *Walker v. Sharpe*, 103 Mass. 154; *Birdsall v. Phillips*, 17 Wend. 464; *Schilling v. Holmes*, 23 Cal. 231. If left upon the premises, without being placed in the hands of some responsible person, it will only be a good notice to quit, if it actually reaches the tenant.

² *Doe v. Palmer*, 16 East, 53; *Tuttle v. Bean*, 13 Metc. 275; *Farson v. Goodale*, 8 Allen, 202; *Norris v. Morrill*, 43 N. H. 218; *Collins v. Canty*, 6 Cush. 415; *Prindle v. Anderson*, 19 Wend. 391; *Kimball v. Rowland*, 6 Gray, 224.

³ *Doe v. Humphries*, 2 East, 237; *Goodright v. Cordwent*, 6 T. R. 219; *Kimball v. Rowland*, 6 Gray, 224; *Prindle v. Anderson*, 19 Wend. 391.

SECTION III.

TENANCY AT SUFFERANCE.

SECTION 225. Tenancy at sufferance, what is.

226. Incidents of tenancy at sufferance.

227. How the tenancy is determined.

228. The effect of forcible entry.

§ 225. **Tenancy at sufferance, what is.** — When one, who has come lawfully into the possession of lands under an agreement with the owner, retains such possession, after his right to it is determined, he is said to be a tenant at sufferance. His estate is an unlawful one; he has, in fact, no right to possession, but yet is not a trespasser.¹ Such are all persons who continue in possession, after the determination of their particular estate, by and under which they originally acquired possession. Tenants for years after the expiration of their terms, tenants *pur autre vie* after the death of the *cestui que vie*, sublessees after the determination of the original lease and the like, are all tenants at sufferance.² But in order that a tenancy at sufferance may arise, the estate, under which possession was originally gained, must have been created by the agreement of the parties. If one enters into the possession by the act or authority of the law, as, for example, a guardian, and retains possession after the law ceases to authorize it, he is a trespasser and not a tenant at sufferance.³ And a

¹ 2 Bla. Com. 150; 1 Washb. on Real Prop. 616; Co. Lit. 57 b; Williams on Real Prop. 389; Doe v. Hull, 2 D. & R. 38; Russell v. Fabyan, 34 N. H. 218; Uridias v. Morrell, 25 Cal. 35.

² Co. Lit. 57 b; 2 Bla. Com. 150; Simkin v. Ashhurst, 1 Crompt. M. & R. 261; Benedict v. Morse, 10 Metc. 223; Creech v. Crockett, 5 Cush. 133; Jackson v. Parkhurst, 5 Johns. 128; Hyatt v. Wood, 4 Johns. 150; Livingston v. Tanner, 12 Barb. 481; Smith v. Littlefield, 51 N. Y. 543.

³ Co. Lit. 57 b; 1 Washb. on Real Prop. 618; Merrill v. Bullock, 105 Mass. 491.

tenancy at sufferance would only exist, where the holding over is not in pursuance of an agreement between the parties. Such an agreement would change the relation from a tenancy at sufferance to one at will or from year to year.¹ And although an agreement in the original lease, to pay rent for the time that the tenant continues in possession after the expiration of his term, will not take away from such holding over the character of a tenancy at sufferance, yet the actual payment and receipt of rent, in pursuance of such an agreement or without any previous agreement, will make the holding a tenancy at will, or one from year to year, according to the circumstances.²

§ 226. **Incidents of tenancy at sufferance.** — Unlike all other tenancies, it does not rest upon privity of contract. It is created by implication of law, for the purpose, perhaps the sole purpose, of establishing between the owner and the person holding over the tenure, usually existing between landlord and tenant. As a consequence of this tenure, a tenant at sufferance cannot, in an action by the reversioner for the recovery of the possession, deny the title of his lessor, or set up in defence a superior title which he has acquired by purchase.³ Nor can the tenant give to his holding the character of adverse possession, so as to bar the lessor's claim under the Statute of Limitations.⁴ It has been stated that the statute may run against the landlord in an estate for years, where the tenant gives actual notice by word or deed that he is claiming adverse possession, and that the statute

¹ 1 Washb. on Real Prop. 618, 619.

² Russell v. Fabyan, 34 N. H. 223; Edwards v. Hale, 9 Allen, 462; Emmons v. Scudder, 115 Mass. 367; Schuyler v. Smith, 51 N. Y. 309; Finney v. St. Louis, 39 Mo. 177; Hunt v. Bailey, *Ib.* 257; Bircher v. Parker, 40 Mo. 148.

³ Jackson v. McLeod, 12 Johns. 182; Griffin v. Sheffield, 38 Miss. 390; 1 Washb. on Real Prop. 618, 619.

⁴ 1 Washb. on Real Prop. 620; Doe v. Hull, 2 D. & R. 38. See Edwards v. Hale, 9 Allen, 464; Gwynn v. Johns 2 Gill & J. 173.

will run from the time that such notice is given. Such, presumably, is the law also in respect to tenancies at sufferance. The tenure existing between the lessor and his tenant at sufferance is identical, in character and scope, with that between landlord and tenant for years. For the details of the doctrine, reference may be had to the chapter on estates for years.¹ The tenant at sufferance has, however, no estate which he may assign, and if he attempts an assignment, his assignee upon entry into possession becomes a trespasser and disseisor, and has neither the rights nor the obligations of a tenant at sufferance.²

§ 227. **How the tenancy is determined.** — The tenancy is determined by the entry of the lessor upon the land, and then the *quondam* tenant is a trespasser, and may be treated as such.³ And although the tenant at sufferance is not liable for rent (except by statute), yet he is liable to the lessor in an action for the mesne profits.⁴

§ 228. **The effect of forcible entry.** — A statute was passed in the reign of Richard II., forbidding entries upon land in support of one's title "with strong hand or a multitude of people, but only in a peaceable and easy manner,"

¹ See *ante*, sect. 200.

² *Nepeau v. Doe*, 2 M. & W. 911; *Thunder v. Belcher*, 3 East, 451; *Reckhow v. Schanck*, 43 N. Y. 448; *Layman v. Throp*, 11 Ired. 352; 1 Washb. on Real Prop. 261.

³ Until entry is made, the land-owner cannot treat the tenant at sufferance as a trespasser. 2 Bla. Com. 150; Co. Lit. 57 b; *Carl v. Lowell*, 19 Pick. 27; *Butcher v. Butcher*, 7 B. & C. 399; *Newton v. Harland*, 1 Mann. & G. 644; *Rising v. Stannard*, 17 Mass. 282. The successful issue of an action of ejectment is equivalent to an entry. No notice to the tenant at sufferance is required to terminate his estate, or to bring ejectment, unless a statute expressly requires it. *Hollis v. Pool*, 3 Metc. 350; *Mason v. Denison*, 11 Wend. 612; *Smith v. Littlefield*, 51 N. Y. 643; *Howard v. Carpenter*, 22 Md. 25; *Young v. Smith*, 28 Mo. 65; *Bennett v. Robinson*, 27 Mich. 32.

⁴ *Sargent v. Smith*, 12 Gray, 426; *Merrill v. Bullock*, 105 Mass. 490; *Cunningham v. Holton*, 55 Me. 33; *Stockton's Appeal*, 64 Pa. St. 63; *Hogsett v. Ellis*, 17 Mich. 368; 1 Washb. on Real Prop. 619, 620.

and providing for the punishment of such offences by indictment and arraignment in the criminal courts. Similar statutes have been passed in most, if not all, of the States of this country. The question has been mooted from an early period, whether it was the purpose of the statute to take away the common-law right to recover one's lawful possession by force of arms, or simply to provide a punishment for the breach of the public peace thereby occasioned. Although there are decisions and some authorities, which maintain that the statute has this double effect, and that such forcible entry would lay the lawful owner open to civil actions for trespass and for assault and battery,¹ yet the weight of authority both in the courts of England and of this country is certainly in favor of confining the operation of the statute to a criminal prosecution for the prohibited entry. The decisions cited below maintain that the plea of *liberum tenementum* is a good plea to every action of trespass *quare clausum fregit*, and even if the tenant is forcibly expelled and suffers personal injuries therefrom, no civil action for any purpose will lie, unless the force used was greater than what was necessary to effect his expulsion.²

¹ Reeder v. Pardy, 41 Ill. 261; Doty v. Burdick, 83 Ill. 473; Knight v. Knight, 90 Ill. 208; Dustin v. Cowdry, 23 Vt. 631; Whittaker v. Perry, 38 Vt. 107 (but see *contra*, Beecher v. Parmelee, 9 Vt. 352; Mussey v. Scott, 32 Vt. 82). See Moore v. Boyd, 24 Me. 247.

² Harvey v. Brydges, 13 M. & W. 437; Davis v. Burrell, 10 C. B. 821; Hilbourne v. Fogg, 99 Mass. 11; Churchill v. Hulbert, 110 Mass. 42; 15 Am. Rep. 578; Clark v. Kelliher, 107 Mass. 406; Stearns v. Sampson, 59 Me. 568; Sterling v. Warden, 51 N. H. 239; 12 Am. Rep. 80; Livingston v. Tanner, 14 N. Y. 64; The People v. Field, 52 Barb. 198; s. c. 1 Lans. 242; Estes v. Kedsey, 8 Wend. 560; Kellam v. Jansom, 17 Pa. St. 467; Zell v. Reame, 31 Pa. St. 304; Todd v. Jackson, 26 N. J. L. 525; Walton v. Fill, 1 Dev. & B. 507; Johnson v. Hanahan, 1 Strobb. 313; Tribble v. Frame, 7 J. J. Marsh. 599; Krevet v. Meyer, 24 Mo. 107; Fuhr v. Dean, 26 Mo. 116. The exercise of sufficient force after a peaceable entry to eject a tenant, is lawful, and cannot sustain an action for assault and battery. Stearns v. Sampson, 59 Me. 568; 8 Am. Rep. 442.

CHAPTER VIII.

JOINT ESTATES.

SECTION I. — *Classes of joint estates.*

II. — *Incidents common to all joint estates.*

III. — *Partition.*

SECTION 235. Joint estates, what are.

§ 235. **Joint estates, what are.** — After discussing the various estates which might be created in lands, in respect to their duration, it is necessary to inquire into their qualities, in respect to the number of owners. From this standpoint, estates are divided into two classes, — estates in severalty and joint estates. An estate in severalty is, as the name implies, one which is held and enjoyed by one to the exclusion of all the world.¹ Joint estates are all other estates, the title to which is vested in two or more persons. These are again subdivided into joint tenancies, tenancies in common, estates in coparcenary, tenancies by the entirety and partnership estates.

SECTION I.

CLASSES OF JOINT ESTATES.

I. — Joint-tenancy.

II. — Tenancy in common.

III. — Estates in coparcenary.

IV. — Estates in entirety.

V. — Estates in partnership.

SECTION 236. Joint-tenancy, what is.

237. Incidents of joint-tenancy.

238. Doctrine of survivorship, — how right of survivorship is destroyed.

239. Tenancy in common, what is.

¹ 1 Washb. on Real Prop. 642; 2 Bla. Com. 179.

SECTION 240. Joint estates, when tenancies in common.

241. Tenancy in coparcenary.

242. Estates in entirety.

243. Estates in entirety in a joint-tenancy, or tenancy in common.

244. Tenancy in common between husband and wife.

245. Estates in partnership.

246. Several interests of partners.

§ 236. **Joint-tenancy, what is.** — A joint-tenancy is an estate held by two or more persons jointly, so that during the lives of all they are equally entitled to the enjoyment of the land, or its equivalent in rents and profits; but, upon the death of one, his share vests in the survivor or survivors, until there be but one survivor, when the estate becomes one in severalty in him, and descends to his heirs upon his death.¹ There may be a joint-tenancy in any one of the estates before explained, in fee, for life, or for years and the like.² But for a reason which will be made clear by a subsequent paragraph, a joint estate can only be created by purchase. It cannot be acquired by descent.³

§ 237. **Incidents of a joint-tenancy.** — It is said that for the creation of a joint-tenancy, the four unities of estate must be present, viz.: unity of interest, title, time, and possession.⁴ All the tenants must have the same interest in the land in respect to the duration of the estate. One cannot be tenant for life, while another is tenant in fee. By unity of title is meant, that all must acquire their interests by the same title. One cannot hold by one deed, and another by a second deed. The estate must vest at the same time, otherwise there will be no unity of time. Two persons cannot be joint-tenants, where the estate is granted in remainder to the heirs of two living persons. The death

¹ 1 Washb. on Real Prop. 642; 1 Prest. Est. 130; 2 Bla. Com. 179, 183.

² 1 Washb. on Real Prop. 642, 643; 2 Bla. Com. 179.

³ 1 Washb. on Real Prop. 643; 2 Bla. Com. 180.

⁴ 1 Washb. on Real Prop. 643; 2 Bla. Com. 180.

of one, during the life of the other, would cause the shares of his heirs to vest before the others. Finally, the estate must take effect in possession at the same time. One cannot have an estate in possession, while the other has an estate in remainder. Joint-tenants, therefore, "have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same possession."¹ And whenever these four unities were present in a joint estate, the estate was construed at common law to be a joint-tenancy, unless the grantor by express limitation gave the estate a different character.² But the American law has been in opposition to joint-tenancy, and has shown more favor to tenancies in common. The doctrine of survivorship has been considered repugnant to the American sense of justice to the heirs. A number of the States have by statute abolished joint-tenancy altogether, except in the case of trustees and other persons, holding a joint-estate in a fiduciary capacity;³ while it may be stated as a general rule in the rest of the States, that a joint-estate will be presumed in every case, except that of trustees, etc., to be a tenancy in common, unless expressly declared to be a joint-tenancy, even though

¹ 2 Bla. Com. 180, 181, 182.

² 1 Washb. on Real Prop. 643; Williams on Real Prop. 132; *Rigden v. Vallier*, 3 Atk. 734. But sometimes the intention to create a tenancy in common is established by implication, as, for example, where the land was purchased with the intention of expending large sums in the improvement of the property, and there is no relationship between the co-tenants to support the contrary presumption, that the estate was intended to be a joint-tenancy. See *Lake v. Craddock*, 3 P. Wms. 158; *Cuyler v. Bradt*, 2 Caines, 326; *Caines v. Grant's Lessee*, 5 Binn. 196; *Duncan v. Forrer*, 6 Binn. 196.

³ Statutes of this character exist in Virginia, North Carolina, South Carolina, Pennsylvania, Georgia, Florida, Kentucky, Tennessee, Alabama, Mississippi, Texas, Ohio, and Connecticut. 1 Washb. on Real Prop. 644, note. See also *Phelps v. Jepson*, 1 Root, 48; *Ball v. Deas*, 1 Strobb. Eq. 24; *Parson v. Boyd*, 20 Ala. 112; *Nichols v. Denny*, 37 Miss. 59; *Kennedy's Appeal*, 6 Pa. St. 511; *Jenk's Lessee v. Backhouse*, 1 Binn. 91; *Baird's Appeal*, 3 Watts & S. 459; *Miles v. Fisher*, 10 Ohio, 1.

the four unities are present.¹ Joint-mortgagees hold by joint-tenancy, until the property is sold under foreclosure, when they become tenants in common.²

§ 238. **Doctrine of survivorship, — how right of survivorship is destroyed.** — The chief incident of joint-tenancies, and that which distinguishes them from tenancies in common, is the right of survivorship. Although the estate is limited to two or more and their heirs, the entire estate falls to the survivor or survivors upon the death of one, to the exclusion of his heirs.³ Nor does the wife or husband of the deceased joint-tenant have respectively dower or curtesy in the estate.⁴ For the reason that corporations cannot be said to die, and therefore there can be no survivorship, if two corporations hold land jointly, they are tenants in common, and not joint-tenants.⁵ Joint-tenants

¹ This statutory rule prevails in Maine, Massachusetts, New Hampshire, Vermont, Rhode Island, New York, Delaware, Maryland, Michigan, Minnesota, Illinois, Wisconsin, Missouri, Indiana, Arkansas, Iowa, California. 1 Washb. on Real Prop. *644, note. See also *Webster v. Vandeventer*, 6 Gray, 428; *Jones v. Crane*, 10 Gray, 308; *Stimpson v. Buttermann*, 5 Cush. 153; *Purdy v. Purdy*, 3 Md. Ch. 547; *Hoffman v. Stigers*, 28 Iowa, 302.

² *Kinsley v. Abbott*, 19 Me. 430; *Pearce v. Savage*, 45 Me. 90; *Donnels v. Edwards*, 2 Pick. 617; *Appleton v. Boyd*, 7 Mass. 131; *Deloney v. Hutchison*, 2 Rand. 183; *Martin v. McReynolds*, 6 Mich. 72. If the debt is joint, it goes to the survivor and he alone must sue. *Webster v. Vandeventer*, 6 Gray, 428. But if the debts are several, belonging to different persons, who together constitute the joint-mortgagees, the doctrine of survivorship does not apply. In the event of the death of one of them, his personal representatives or heirs, according to the local law, must be made joint parties with the survivors. *Brown v. Bates*, 55 Me. 522; *Burnett v. Pratt*, 22 Pick. 551. And although joint-disseisors do not strictly hold in joint-tenancy, it is a familiar rule of the law of adverse possession that, if one abandons the property, the other takes the entire estate. *Putney v. Dresser*, 2 Metc. 583; *Allen v. Holton*, 20 Pick. 458.

³ 1 Washb. on Real Prop. 643; 2 Bla. Com. 183; *Williams on Real Prop.* 134.

⁴ 1 Washb. on Real Prop. 649; Co. Lit. 37 b.

⁵ 1 Washb. on Real Prop. 643; *Dewitt v. San Francisco*, 2 Cal. 289.

are said to hold the entire estate *per my et per tout*,¹ individually and jointly. Upon the death of one, the others do not acquire a new interest in the land by descent from the deceased. Their interest is only indirectly increased by the extinguishment of the deceased joint-tenant's interest. For this reason, in a conveyance by one joint-tenant to another, a release is not only sufficient to vest in the latter the entire estate, but it is the only proper common-law mode of assignment.² But the ordinary deeds of grant will operate, as well as a technical release, in conveying or extinguishing a joint-tenant's interest.³ The survivor's estate will be subject to the same encumbrances as were imposed by him upon his share of the joint-tenancy before the death of his co-tenant.⁴ But a joint-tenancy, and therewith the right of survivorship, may be destroyed by a conveyance by one joint-tenant to a third person. Although he has not the power to devise his interest, and although there is a joint possession and interest in the estate, he may alien his share to a stranger. Such a stranger would at once become a tenant in common, and the alienation would thus destroy the right of survivorship.⁵

¹ 1 Washb. on Real Prop. 642; 2 Bla. Com. 182. Blackstone translates *per my (mie) et per tout*, by the *half* or *moiety*, and by the whole. In Williams on Real Prop. 136, Mitchell's note, a note to Murray v. Hall, 7 Mann. Gr. & Sc. (62 Eng. C. L. R.) 455, is cited to the effect that the proper rendering of *mie* (my) is *nothing* or *not in the least*.

² Williams on Real Pr. 134, 135; Co. Lit. 169 a; 1 Washb. on Real Prop. 648; 1 Prest. Est. 136; Rector v. Waugh, 17 Mo. 13.

³ 1 Washb. on Real Prop. 648; Eustace v. Scawen, Cro. Jac. 696; Chester v. Willan, 2 Saund. 96 a.

⁴ 1 Washb. on Real Prop. 646; Co. Lit. 185 b; Lord Abergavenny's Case, 6 Rep. 78.

⁵ 1 Washb. on Real Prop. 647, 648; Co. Lit. 273 b. One joint-tenant may mortgage his interest in the estate, and to that extent will the *jus accrescendi* be destroyed or rather suspended. York v. Stone, 1 Sulk. 158; 1 Eq. Cas. Abr. 293; Simpson v. Ammons, 1 Binn. 175. But it cannot be taken away by a devise of the deceased co-tenant's share. Co. Lit. 185 b; Duncan v. Forrer, 6 Binn. 193.

§ 239. **Tenancy in common, what is.** — Tenancy in common is a joint estate, in which there is unity of possession, but separate and distinct titles. The tenants have separate and independent freeholds or leaseholds in their respective shares, which they manage and dispose of as freely as if the estate was one in severalty. There is no restriction upon their power of alienation.¹ And the tenant may dispose of it by will, while the heirs of an intestate tenant will inherit the estate. In like manner, the husband or wife of a tenant in common will have, respectively, curtesy and dower in this species of joint estate.² The interest of one tenant in common is so independent of that of his co-tenant, that in a joint conveyance of the estate it would be treated as a grant by each of his own share in the estate.³ And, unlike joint-tenancies, in order to convey the share of one co-tenant to another, the same formal deed is required as in a conveyance of it to a stranger. A simple

¹ 1 Washb. on Real Prop. 652, 653; *Brown v. Wellington*, 106 Mass. 318; 8 Am. Rep. 330; *Butler v. Roys*, 25 Mich. 53; 12 Am. Rep. 218. A co-tenant's interest may be mortgaged. *Green v. Arnold*, 11 R. I. 364; 23 Am. Rep. 466. And it can be levied upon in satisfaction of the co-tenant's debts. *Boylston Insurance Co. v. Davis*, 68 N. C. 17; 12 Am. Rep. 624; *Newton v. Howe and Drury*, 29 Wis. 531; 9 Am. Rep. 616; *Peabody v. Minot*, 24 Pick. 329; *Duncan v. Sylvester*, 24 Me. 482; *Whilton v. Whilton*, 38 N. H. 127; *Griswold v. Johnson*, 5 Conn. 363; *Prim v. Walker*, 38 Mo. 97; *White v. Sayre*, 2 Ohio, 302; *McKey v. Welch*, 22 Texas, 390.

² 1 Washb. on Real Prop. 654.

³ 1 Washb. on Real Prop. 656; 2 Prest. Abst. 77. And in the same manner, if a covenant of warranty in the conveyance of a tenancy in common is broken, each co-tenant can sue individually for the breach. *Lamb v. Danforth*, 59 Me. 322; 8 Am. Rep. 426. But they must join in an action for the recovery of the possession. *Co. Lit.* 200 a; *Rehoboth v. Hunt*, 1 Pick. 224; *Allen v. Gibson*, 4 Rand. 468; *Johnson v. Harris*, 5 Hayw. 113; *Young v. Adams*, 14 B. Mon. 127; *Hines v. Frantham*, 27 Ala. 359; *Hughes v. Holliday*, 3 Greene (Iowa), 30; *Muller v. Boggs*, 25 Cal. 187. *Contra*, *Hillhouse v. Mix*, 1 Root, 246. And in the same manner they must sue jointly for injuries to the possession, such as trespass, nuisance, etc. *Phillips v. Sherman*, 61 Me. 548; *Merrill v. Berkshire*, 11 Pick. 269; *Austin v. Hall*, 13 Johns. 286; *Dupuy v. Strong*, 37 N. Y. 372; *Doe v. Botts*, 4 Bibb. 420; *Parke v. Kilham*, 8 Cal. 77.

technical release, without words of inheritance, would not be sufficient. Tenants in common are not seised of the entire estate. They do not hold it *per my et per tout*.¹

§ 240. **Joint estates, when tenancies in common.**—The common-law rule was that all estates, acquired by purchase, under circumstances which prevented the presence and existence of the so-called *four unities*, were tenancies in common.² But, as has been explained above, the rule has now been changed and modified in this country, so that the general rule here is that all joint estates are held to be tenancies in common, where they are not expressly made joint-tenancies, whether acquired by purchase or by descent, except in the few localities where tenancy in coparcenary still exists.³ In a tenancy in common the unity of possession is all that is required. The estates, the titles, and the times of enjoyment might all be different. One tenant may thus have a life estate and another a fee, acquired by different titles. There may be a tenancy in common in a future estate, and their titles may vest and be executed in possession at different periods, provided at some time during the existence of both estates there is a unity of possession.⁴

¹ Co. Lit. 193 a, n. 80; 1 Washb. on Real Prop. 652. It will of course be understood that, when speaking of the necessity of words of limitation, reference is made only to the common-law rule. Where the necessity of words of limitation has been removed by statute, in the grant of one co-tenant to the other, an ordinary deed of release will operate to pass the estate in fee, without words of limitation. See *post*, sect. 780.

² 2 Bla. Com. 191.

³ 4 Kent's Com. 367; 1 Washb. on Real Prop. 653; *Miller v. Miller*, 16 Mass. 59; *Sigourney v. Eaton*, 14 Pick. 414; *Gilman v. Morrill*, 8 Vt. 74; *Aldrich v. Martin*, 4 R. I. 520; *Evans v. Brittain*, 3 Serg. & R. 135; *Partridge v. Colegate*, 3 Har. & McH. 339; *Johnson v. Harris*, 5 Hayw. 113; *Young v. DeBruhl*, 11 Rich. L. 638; *Briscoe v. McGee*, 2 J. J. Marsh. 370; *Challefoux v. Ducharme*, 8 Wis. 287. As to what declaration is necessary to create a joint-tenancy, see *Hersky v. Clark*, 35 Ark. 17; 37 Am. Rep. 1.

⁴ 1 Washb. on Real Prop. 652; 2 Bla. Com. 191; 1 Prest. Est. 139. That there may be a tenancy in common in a remainder, see *Coleman v. Lane*, 26 Ga. 515.

§ 241. **Tenancy in coparcenary.** — This tenancy is the joint estate which, according to common law, vested by descent in the heirs of an intestate. It partakes of the characteristics of both joint-tenancies and tenancies in common. Like joint-tenancies, in a conveyance by one co-tenant to another of his share, a simple release was sufficient without words of inheritance, since they were all seised in fee of the entire estate by descent.¹ And they were like tenancies in common, in that the doctrine of survivorship did not obtain in respect to the respective shares of the tenants. The heirs of a deceased tenant in coparcenary inherited his share.² And a coparcenary may make a devise of his estate.³ But in this country the doctrine of coparcenary has never prevailed except in Maryland; in all other States joint estates by descent, are treated as tenancies in common. The subject, therefore, is of very little importance to American students.⁴

§ 242. **Estates in entirety.** — This is an estate arising in the conveyance to a man and wife jointly. They are not seised of moieties, but of entireties; hence the name, *estate in entirety*.⁵ They resemble joint-tenancies in that

¹ Co. Lit. 273 b; 1 Prest. Est. 138; *Gilpin v. Hollingsworth*, 3 Md. 190.

² 2 Bla. Com. 188; 1 Washb. on Real Prop. 650.

³ 1 Washb. on Real Prop. 651; 2 Prest. Abst. 72.

⁴ 1 Washb. on Real Prop. 651; 4 Kent's Com. 367; *Johnson v. Harris*, 5 Hayw. 113; *Hoffar v. Dement*, 5 Gill, 132; *Gilpin v. Hollingsworth*, 3 Md. 190.

⁵ 1 Prest. Est. 131; *Shaw v. Hearsey*, 5 Mass 521; *Draper v. Jackson*, 16 Mass. 480; *Harding v. Springer*, 14 Me. 407; *Doe v. Howland*, 8 Cow. 277; *Torrey v. Torrey*, 14 N. Y. 430; *Wright v. Sadler*, 20 N. Y. 320; *Brownson v. Hull*, 16 Vt. 309; *Fairechild v. Chastelleux*, 1 Pa. St. 176; *Den v. Branson*, 5 Ired. 426; *Babbit v. Scroggin*, 1 Duv. 272; *Paul v. Campbell*, 7 Yerg. 319; *Davis v. Clark*, 26 Ind. 424; *Gibson v. Zimmerman*, 12 Mo. 385; *Ketchum v. Wadsworth*, 5 Wis. 95; *Lux v. Hoff*, 47 Ill. 425. In those States where statutes have been passed, giving to married women, in respect to their property, the rights of *femes sole*, it has become a question of great doubt, whether tenancy in entirety has been abolished inferentially by the statute.

they have the quality of survivorship; the heirs of the survivor would take to the exclusion of the heirs of the first deceased.¹ But, unlike joint-tenancies, the right of survivorship cannot be destroyed by the action of either party. There can, therefore, be no partition of the estate.² During coverture the husband has the entire control of the estate, may convey it away, and it is liable to be sold under execution for his debts. If the husband survives the wife, this conveyance of it to a stranger will be as absolute, as if the estate had been one in severalty.³ But if the wife survives the husband, she acquires, by the right of survivorship, the entire interest in the land, and is entitled to her proper action for the recovery of the possession.⁴ The Statute of Limitations cannot run against her right of survivorship during the disability of coverture.⁵

§ 243. **Estate in entirety in a joint-tenancy, or tenancy in common.** — As a consequence of the doctrine explained in the foregoing paragraph, if husband and wife, as such, are made joint-tenants or tenants in common with

In the following cases, it has been held that the statute has had no effect upon the estates in entirety and that a conveyance to man and wife makes them tenants in entirety now, as well as before the statute. *Marburg v. Cole*, 49 Md. 402; 33 Am. Rep. 266; *Hulett v. Inlow*, 57 Ind. 412; 26 Am. Rep. 64; *Hemingway v. Scales*, 42 Miss. 1; 2 Am. Rep. 586; *McCurdy v. Canning*, 64 Pa. St. 39; *Diver v. Diver*, 56 Pa. St. 106; *Bennett v. Child*, 19 Wis. 365; *Fisher v. Provin*, 25 Mich. 347; *Garner v. Jones*, 52 Mo. 68; *Robinson v. Eagle*, 29 Ark. 202; *Goelett v. Gori*, 31 Barb. 314. But a contrary conclusion is reached by the courts in the cases cited *post*. *Cooper v. Cooper*, 76 Ill. 57; *Hoffman v. Steigers*, 28 Iowa, 302; *Clark v. Clark*, 56 N. H. 105; *Meeker v. Wright*, 75 N. Y. 262, overruling the prior Supreme Court decisions.

¹ 1 Washb. on Real Prop. 672, 673; 1 Prest. Est. 132.

² 1 Washb. on Real Prop. 673; *Bennett v. Child*, 19 Wis. 364.

³ 1 Prest. Est. 135; *Barber v. Harris*, 15 Wend. 615; *Needham v. Branson*, 5 Ired. 426; *Ames v. Norman*, 4 Sneed, 683; *Tane v. Campbell*, 7 Yerg. 319; *Bennett v. Child*, 19 Wis. 364.

⁴ *Pierce v. Chase*, 108 Mass. 258; *French v. Mehan*, 56 Pa. St. 286; *McCurdy v. Canning*, 64 Pa. St. 39.

⁵ 1 Washb. on Real Prop. 673; Co. Lit. 326 a.

others, they will be considered as one co-tenant, and will take but one share between them, equal to the shares of the others. Thus if A. and B., husband and wife, are made joint-tenants with C., A. and B. will take a one-half interest, while C. will have the other half. And the death of the husband or wife would have no effect on C.'s share. On the other hand, if C. died, A. and B. would take the whole estate in entirety.¹

§ 244. **Tenancy in common between husband and wife.** — Although the estate in entirety has met with general recognition in this country, yet in a number of States the estate does not exist, and a joint estate held by husband and wife is either treated as a tenancy in common, as in Ohio and Virginia, or as a joint-tenancy, as in Connecticut.² And furthermore, if at any time a joint-tenancy or tenancy in common is desired to be created between man and wife, a joint estate will be treated as such, if that intention is clearly expressed in the deed or will.³

§ 245. **Estates in partnership.** — When a joint estate is vested in the members of a partnership, purchased with partnership funds and for partnership purposes, it is called an estate in partnership. The estate is treated in equity as personal property, and made liable to the satisfaction of partnership's debts, in preference to the claims of private creditors or the widows and heirs of one of the partners. Real estate held by a partnership is subject to the partnership debts,

¹ 1 Washb. on Real Prop. 674; Williams on Real Prop. 225; 1 Prest. Est. 132; Barber v. Harris, 15 Wend. 615; Johnson v. Hart, 6 Watts & S. 319; Gordon v. Whieldon, 11 Beav. 170.

² See 1 Washb. on Real Prop. 674, 675; Whittlesey v. Fuller, 11 Conn. 337; Sergeant v. Steinberger, 2 Ohio, 305; Wilson v. Fleming, 13 Ohio, 68.

³ 1 Washb. on Real Prop. 674; McDermott v. French, 15 N. J. Eq. 81. In Kentucky and Iowa, a conveyance to husband and wife gives them a tenancy in common, unless the estate is expressly declared to be a tenancy in entirety. Rogers v. Grider, 1 Dana, 242; Hoffman v. Stigers, 28 Iowa, 302.

and until they are satisfied, no other claim can be made upon the share of any one of the partners.¹ And if one partner has paid more than his share of the debts, he has also a lien upon the real estate to protect his right of contribution for such over-payment.² Real estate, purchased by a firm, will have in equity all the characteristics of an estate in copartnership, even though the legal title be taken in the name of one partner. He will hold the legal title in trust for the partnership. Of course, if the partner holding the legal title disposes of it to a purchaser for value without notice of the trust, the purchaser will take to the exclusion of the partnership claims.³

§ 246. **Several interests of partners.** — When, however, the partnership debts have all been paid, the partners are tenants in common of the partnership lands. Their widows have dower, and their heirs are entitled to it upon the decease of the partners. It is also subject to partition.⁴ In this country, at least, if the real estate had to be sold to

¹ *Cox v. McBurney*, 2 Sandf. 561; *Delmonico v. Guillaume*, 2 Sandf. Ch. 366; *Deming v. Colt*, 3 Sandf. 284; *Lane v. Tyler*, 49 Me. 252; *Goodwin v. Richardson*, 11 Mass. 469; *Galbraith v. Gedge*, 16 B. Mon. 631; *Howard v. Priest*, 5 Metc. 582; *Lang v. Waring*, 25 Ala. 625; *Marvin v. Trumbull*, Wright, 386; *Lancaster Bk. v. Myley*, 15 Pa. St. 544; *Coder v. Huling*, 27 Pa. St. 84; *Piatt v. Oliver*, 3 McLean, 27; *Black v. Black*, 15 Ga. 445; *Arnold v. Wainwright*, 6 Minn. 370; *Hunter v. Martin*, 2 Rich. L. 541; 1 Pars. on Con. 149.

² *Buffum v. Buffum*, 49 Me. 108; *Burnside v. Merrick*, 4 Metc. 537; *Howard v. Priest*, 5 Metc. 585; *Smith v. Jackson*, 2 Edw. Ch. 28; *Loubat v. Nourse*, 5 Fla. 350.

³ *Smith v. Allen*, 5 Allen, 456; *Moreau v. Safferans*, 3 Sneed, 595; 1 Pars. on Con. 153.

⁴ *Lane v. Tyler*, 49 Me. 252; *Goodwin v. Richardson*, 11 Mass. 469; *Howard v. Priest*, 5 Metc. 582; *Whaling Co. v. Borden*, 10 Cush. 458; *Tillinghast v. Champlin*, 4 R. I. 173; *Olcott v. Wing*, 4 McLean, 15; *Deloney v. Hutcheson*, 2 Rand. 183; *Loubat v. Nourse*, 5 Fla. 363; *Ludlow v. Cooper*, 4 Ohio St. 1; *Dilworth v. Mayfield*, 36 Miss. 40; *Buchan v. Sumner*, 2 Barb. Ch. 163; *Buckley v. Buckley*, 11 Barb. 43; *Piper v. Smith*, 1 Head, 93; *Patterson v. Blake*, 12 Ind. 436. Where there are debts unsatisfied, equity regards the real estate as personality, so far as to enable the surviving partner to dis-

liquidate the partnership debts, any surplus that might be found undisposed of would be treated as real property, and go to the widow and heirs of a deceased partner.¹

pose of it for the satisfaction of the partnership debts, and a court of equity will compel the widow and heirs of the deceased partner to execute the deeds of conveyance. *Delmonico v. Guillaume*, 2 Sandf. Ch. 366; *Boyce v. Coster*, 4 Strobh. Eq. 25; *Winslow v. Chiffelle*, Har. Eq. 25; *Matlock v. Matlock* 5 Ind. 403; *Boyers v. Elliott*, 7 Humph. 204; *Arnold v. Wainwright*, 6 Minn 358.

¹ *Offut v. Scott*, 47 Ala. 105; *Foster's Appeal*, 74 Pa. St. 398; 22 Am Law Reg. 300, notes 307-310. See also, generally, *Shearer v. Shearer*, 98 Mass. 107; *Jones' Appeal*, 70 Pa. St. 169; *Bopp v. Fox*, 63 Ill. 540; 1 Pars. on Con. 150. In England, the interest of the partner in partnership real estate is looked upon as personalty, and therefore, the surplus after satisfaction of the partnership debts, goes to the personal representatives, instead of to the heirs. *Darby v. Darby*, 3 Drewry, 495; 1 Pars. on Con. 149. And see *Rice v. Barnard*, 20 Vt. 479; *Lang v. Waring*, 17 Ala. 145.

SECTION II.

INCIDENTS COMMON TO ALL JOINT ESTATES.

SECTION 251. Disseisin by one co-tenant.

252. Adverse title acquired by one co-tenant.

253. Alienation of joint estates.

254. Waste by co-tenants.

255. Liability of one co-tenant for rents and profits.

§ 251. **Disseisin by one co-tenant.** — As the possession of co-tenants is common to all, a tenure exists between them in respect thereto, so that if one co-tenant is in possession, his possession is generally held to be for the benefit of all; the sole possession by one does not constitute in itself a disseisin of the other co-tenants, notwithstanding it continues for the statutory period of limitation.¹ To create a title by adverse possession in one co-tenant, he must not only have exclusive possession, but he must also deny the right of the others in the estate, and maintain such denial long enough for those rights to be barred by the Statute of Limitations; and this denial must expressly, or by necessary implication, be made known to the others.² Among the acts which produce such an ouster of the co-tenants, as to

¹ *McClung v. Ross*, 5 Wheat. 116; *Clymer v. Dawkins*, 3 How. 674; *Colburn v. Mason*, 25 Me. 434; *Barnard v. Pope*, 14 Mass. 434; *Brown v. Wood*, 17 Mass. 68; *Catlin v. Kidder*, 7 Vt. 12; *Thomas v. Hatch*, 3 Sumn. 170; *Campbell v. Campbell*, 13 N. H. 483; *German v. Machin*, 6 Paige Ch. 288; *Clowes v. Hawley*, 12 Johns. 484; *Lloyd v. Gordon*, 2 Har. & McH. 254; *Martin v. Quattlebaum*, 3 McCord, 205; *Prage v. Chinn*, 4 Dana, 50; *Brown v. Hogle*, 30 Ill. 119; *Story v. Saunders*, 8 Humph. 663.

² *Doe v. Bird*, 11 East, 49; *Brackett v. Norcross*, 1 Me. 89; *Harpending v. Dutch Church*, 16 Pet. 455; *Willison v. Watkins*, 3 Pet. 52; *Munroe v. Luke*, 1 Metc. 670; *Presbrey v. Presbrey*, 13 Allen, 284; *Roberts v. Morgan*, 30 Vt. 319; *Jackson v. Tibbitts*, 9 Cow. 241; *Forward v. Deetz*, 32 Pa. St. 69; *Meredith v. Andres*, 7 Ired. L. 5; *Gray v. Givens*, Riley Ch. 41; *Abercrombie v. Baldwin*, 15 Ala. 763; *Corbin v. Cannon*, 31 Miss. 570; *Hofstetter v. Blattner*, 8 Mo. 276; *Owen v. Morton*, 24 Cal. 377.

cause the statute to run against them, is the refusal to share in the profits, a conveyance of the entire estate to a third party who enters into possession, an entry into possession of parts of the estate under an agreement that this shall be a practical partition, and many other acts which are inconsistent with their joint-ownership.¹ If the co-tenant in possession refuses to recognize the rights of the others, by a refusal to share in the rents and profits, or resistance of their right to enter into possession, they may have either trespass or ejectment at their election for such ouster.² But neither action can be maintained against a co-tenant, as long as they both remain in possession, and the wrong complained of does not constitute a clear case of eviction or destruction of some part of the common property.³ But there may be an ouster from one part of the land, while the tenant so evicted remains in possession of another part, and trespass would lie for such partial eviction.⁴

§ 252. **Adverse title acquired by one co-tenant.** — So intimate is the relation of co-tenants that one cannot acquire by purchase an adverse and superior title, and set it up in opposition to his co-tenants, unless they refuse to contribute

¹ *Thomas v. Pickering*, 13 Me. 337; *Bigelow v. Jones*, 10 Pick. 160; *Higbee v. Rice*, 5 Mass. 344; *Jackson v. Whitbeck*, 6 Cow. 632; *Bogardus v. Trinity Church*, 4 Paige, 178; *Rider v. March*, 46 Pa. St. 380; *Cullen v. Motzer*, 13 Serg. & R. 356; *Frederick v. Gray*, 10 Serg. & R. 182; *Great Falls Co. v. Worster*, 15 N. H. 412; *Jones v. Weathersbee*, 4 Strobb. 50; *Gill v. Fauntleroy*, 8 B. Mon. 177; *Weisinger v. Murphy*, 2 Head, 674; *Miller v. Miller*, 60 Pa. St. 10; *Hinkley v. Green*, 52 Ill. 230.

² *Keay v. Goodwin*, 16 Mass. 1; *Bennett v. Clemence*, 6 Allen, 18; *Erwin v. Olmstead*, 7 Cow. 229; *King v. Phillips*, 1 Lans. 421; *Austin v. Rutland*, etc., R. R., 45 Vt. 215; *McGill v. Ash*, 7 Pa. St. 397; *McPherson v. Seguire*, 3 Dev. 153; *Lawton v. Adams*, 29 Ga. 273; *Jones v. Chiles*, 8 Dana, 163.

³ *Jewett v. Whitney*, 43 Me. 242; *Silloway v. Brown*, 12 Allen, 37; *Erwin v. Olmstead*, 7 Cow. 229; *Bennet v. Bullock*, 35 Pa. St. 364; *Filbert v. Hoff*, 42 Pa. St. 97.

⁴ *Murray v. Hall*, 7 C. B. 441; *Bennett v. Clemence*, 6 Allen, 10; *Carpentier v. Webster*, 27 Cal. 524.

their share of the expense of procuring the paramount title. The title is held to be acquired by one for the benefit of all.¹

§ 253. **Alienation of joint estates.**—The co-tenants of all kinds of joint estates, except tenants in entirety, may alien their shares in the estates, without the participation or consent of the other tenants. Their deeds convey whatever interest they possess.² But a tenant cannot, without the consent of his co-tenants, give an absolute title to any part of the estate, described by metes and bounds, equal in value to his undivided share in the joint estate, which will be binding upon his co-tenants.³ And some of the courts deny the efficacy of such a conveyance for any purpose, without the consent of the co-tenants. It conveys to the grantee no interest whatsoever in the general estate.⁴ But the more rational and equitable theory would seem to be,

¹ *Braintree v. Battles*, 6 Vt. 395; *Van Horne v. Fonda*, 5 Johns. Ch. 407; *Wells v. Chapman*, 4 Sandf. Ch. 312; *Lloyd v. Lynch*, 28 Pa. St. 419; *Hussey v. Blood*, 29 Pa. St. 319; *Flagg v. Maun*, 2 Sumn. 490; *Venable v. Beauchamp*, 3 Dana, 321; *Picot v. Page*, 26 Mo. 398; *Morgan v. Herrick*, 21 Ill. 491; *Butler v. Porter*, 13 Mich. 292; *Rothwell v. Dewees*, 2 Black, 613; *Weare v. Van Meter*, 42 Iowa, 128; 20 Am. Rep. 616; *Fallon v. Chidester*, 46 Iowa, 588; 26 Am. Rep. 164. It is a fraud for one tenant to let the taxes remain unpaid, and then buy in the tax-title, for the purpose of acquiring title to the whole premises. *Brown v. Hogle*, 30 Ill. 119.

² *Peabody v. Minot*, 24 Pick. 329; *Butler v. Roys*, 25 Mich. 53; 12 Am. Rep. 218; *Brown v. Wellington*, 106 Mass. 318; 8 Am. Rep. 300; *Rector v. Waugh*, 17 Mo. 13; *York v. Stone*, 1 Salk. 158; *Simpson v. Ammons*, 1 Binn. 175; *Green v. Arnold*, 11 R. I. 364; 23 Am. Rep. 330.

³ *Brown v. Bailey*, 1 Metc. 254; *Nichols v. Smith*, 22 Pick. 316; *Peabody v. Minot*, 24 Pick. 329; *Duncan v. Sylvester*, 24 Me. 482; *Staniford v. Fullerton*, 18 Me. 229; *Whilton v. Whilton*, 38 N. H. 127; *Smith v. Knight*, 29 N. H. 9; *Griswold v. Johnson*, 5 Conn. 363; *Prim v. Walker*, 38 Mo. 97; *Jewett's Lessee v. Stockton*, 3 Yerg. 492; *Good v. Coombs*, 28 Texas, 51; *McKey v. Welch*, 22 Texas, 390; *Challefoux v. Ducharme*, 4 Wis. 554.

⁴ *Soutter v. Porter*, 17 Me. 405; *Phillips v. Tudor*, 10 Gray, 82; *Great Falls Co. v. Worster*, 15 N. H. 412; *Johnson v. Stevens*, 7 Cush. 431; *Cripper v. Morse*, 49 N. Y. 67; 3 Washb. on Real Prop. 261; *Cox v. McMullin*, 14 Gratt. 84. But where the joint estate consists of several distinct parcels,

that such a conveyance would pass whatever was the grantor's proportionate share in that part of the joint estate, and make the grantee a co-tenant in the general estate to the extent of the interest so conveyed. Thus, if one of two equal co-tenants conveys his share in one-half of the joint estate, described by metes and bounds, his grantee would become a co-tenant with the others in an undivided one-fourth of the whole estate.¹ For it is undisputed that if the owner of land grants a specified number of acres in the estate without describing them, his grantee will become a tenant in common with him, his share being covered by the ratio which his number of acres bore to the whole estate.² The description by metes and bounds may be treated as surplusage, except for the purpose of determining the grantee's aliquot share in the entire joint estate.

§ 254. **Waste by co-tenants.** — If one co-tenant misuse or abuse the property, while in possession, he is liable to the others for waste. But as a general rule he is only liable, where the waste complained of results in an actual injury to the property. He must do something more than exercise the rights of ownership. He may therefore be held liable for negligence in keeping up the necessary re-

there is no objection to the conveyance of one co-tenant's interest in one parcel. *Butler v. Roys*, 25 Mich. 53; 12 Am. Rep. 218; *Peabody v. Minot*, 24 Pick. 329.

¹ *Reinicker v. Smith*, 2 Har. & J. 421; *White v. Sayre*, 2 Ohio, 302; *Treon's Lessee v. Emerick*, 6 Ohio, 391; *Campan v. Godfrey*, 18 Mich. 39. See *Newton v. Home and Drury*, 29 Wis. 531; 9 Am. Rep. 616; *Boylston Ins. Co. v. Davis*, 68 N. C. 17; 12 Am. Rep. 624; *Holcomb v. Coryell*, 11 N. J. Eq. 548; *Jewett v. Foster*, 14 Gray, 496; *Gibbs v. Swift*, 12 Cush. 393; *Preston v. Robinson*, 24 Vt. 583; *Jackson v. Livingston*, 7 Wend. 136; *Wolford v. McKinna*, 23 Texas, 45; *Schenck v. Evoy*, 24 Cal. 110. *Contra*, *Shackleford v. Bailey*, 35 Ill. 391.

² *Jewett v. Foster*, 14 Gray, 496; *Gibbs v. Swift*, 12 Cush. 393; *Preston v. Robinson*, 24 Vt. 593; *Jackson v. Livingston*, 7 Wend. 136; *Wofford v. McKinna*, 23 Texas, 45; *Schenck v. Evoy*, 24 Cal. 110. *Contra*, *Shackleford v. Bailey*, 35 Ill. 391.

pairs, or doing any affirmative act which injures the inheritance, such as flowing land, pulling down houses, and the like.¹ And if a co-tenant threatens wilful and malicious destruction of the property, he may be restrained by injunction.² But the tenant is under no obligation to make improvements, and if one co-tenant enters upon the land and makes improvements, he cannot hold the others liable for their share, nor can he claim the exclusive right to these improvements. But if the repairs are necessary to prevent the property from going to decay, he may either compel the others to join him in making the repairs, or, if he has notified them that such repairs are necessary, bring an action against them for their share of the expenses.³

§ 255. **Liability of one co-tenant for rents and profits.** — If one tenant cuts timber upon the land, and sells it, the co-tenants are entitled to their share of the money so received. And so also would he be liable to account for rents, received by him from the tenant of the land, over and above his share.⁴ But in order that a co-tenant may be held

¹ *Hines v. Robinson*, 57 Me. 328; *Hutchinson v. Chase*, 39 Me. 508; *Hastings v. Hastings*, 110 Mass. 285; *Chesley v. Thompson*, 3 N. H. 9; *Odiorne v. Lyford*, 9 N. H. 502; *McLellan v. Jenness*, 43 Vt. 183; 5 Am. Rep. 270; *Hayden v. Merrill*, 44 Vt. 336; 8 Am. Rep. 372; *Elwell v. Burnside*, 44 Barb. 454; *Anderson v. Meredith*, 3 Dev. & B. 199; *Farr v. Smith*, 9 Wend. 338; *Hyde v. Stone*, 9 Cow. 230; *Harmon v. Gartman*, Harper, 430; *Shields v. Stark*, 14 Ga. 429; *Fightmaster v. Beasley*, 7 J. J. Marsh. 410.

² 1 Washb. on Real Prop. 661; *Twort v. Twort*, 16 Ves. 123. See *Martin v. Knowlys*, 8 T. R. 146; *Wilbraham v. Snow*, 2 Saund. 47.

³ *Doane v. Badger*, 12 Mass. 65; *Coffin v. Heath*, 6 Metc. 79; *Calvert v. Aldrich*, 99 Mass. 78; *Stevens v. Thompson*, 17 N. H. 109; *Cheesebro v. Green*, 10 Conn. 318; *Mumford v. Brown*, 6 Cow. 475; *Scott v. Guernsey*, 48 N. Y. 106; *Taylor v. Baldwin*, 10 Barb. 582; *Crest v. Jacks*, 3 Watts, 239; *Dech's Appeal*, 57 Pa. St. 472; *Israel v. Israel*, 30 Md. 128; *Ottumwa Lodge v. Lewis*, 34 Iowa, 67.

⁴ *Miller v. Miller*, 7 Pick. 133; *Peck v. Carpenter*, 7 Gray, 283; *Dickinson v. Williams*, 11 Cusk. 258; *Gowen v. Shaw*, 40 Me. 56; *Webster v. Calef*, 47 N. H. 239; *Hayden v. Merrill*, 44 Vt. 336; 8 Am. Rep. 372; *Izard v. Bodine*, 11 N. J. Eq. 403; *Israel v. Israel*, 30 Md. 126; *Huff v. McDonald*, 22 Ga.

personally liable for rent through his own use and occupation of the land, a special agreement to that effect must be shown. An occupancy by one co-tenant without the interference of the others is not sufficient. He is merely exercising his right of ownership.¹ And when a co-tenant is liable for use and occupation, the claim is personal, and is not assigned with the grant of the claimant's estate.²

131; *Pico v. Columbet*, 12 Cal. 414. But one co-tenant may cut the grass, growing on the common estate, sell it, and apply the profits to his own use *Brown v. Wellington*, 106 Mass. 318; 8 Am. Rep. 300. See *Kean v. Connely* 25 Minn. 222; 33 Am. Rep. 458.

¹ *Sargent v. Parsons*, 12 Mass. 149; *Calhoun v. Curtis*, 4 Metc. 413; *Scots v. Guernsey*, 60 Barb. 163; *Kline v. Jacobs*, 68 Pa. St. 57; *Keisel v. Earnest*, 21 Pa. St. 90; *Israel v. Israel*, 30 Md. 120; *McMahon v. Burchell*, 2 Phil. Eq. 134; *Lyles v. Lyles*, 1 Hill Ch. 85; *Crow v. Mark*, 52 Ill. 332; *Everts v. Beach*, 31 Mich. 136; 18 Am. Rep. 169; *Pico v. Columbet*, 12 Cal. 414. But see *contra*, *Holt v. Robertson*, McMull. 475; *Thompson v. Bostick*, *Id.* 75; *Hayden v. Merrill*, 44 Vt. 430; 8 Am. Rep. 372. And likewise, if one co-tenant plants a crop upon the common estate, it belongs to him exclusively, and his co-tenant would be liable as a trespasser, if he appropriated it to himself. *Calhoun v. Curtis*, 4 Metc. 413; *Bird v. Bird*, 15 Fla. 424; 21 Am. Rep. 296 See *Kean v. Connely*, 25 Minn. 222; 33 Am. Rep. 458.

² 1 Washb. on Real Prop. 663; *Hannan v. Osborn*, 44 Paige Ch. 33.

SECTION III.

PARTITION.

- SECTION 259.** Definition of partition.
260. Voluntary partition.
261. Involuntary or compulsory partition.
262. Who can maintain action for partition.
263. Partial partition.
264. Manner of allotment.
265. Effect of partition.

§ 259. **Definition of partition.** — Partition is the act of dividing up the joint estates into estates in severalty among the co-tenants, in the proportion of their undivided shares in the joint estate. This can be done with any joint estate in possession, except estates in entirety.¹

§ 260. **Voluntary partition.** — As co-tenants of joint estates generally have the unrestricted power of aliening their shares in the common estate, it is possible for them to make partition of the estate by mutual conveyances to each other of their share in different parts of the estate; that is, by dividing up the estate into several parcels, and making conveyance of one parcel to each, all joining in the deed or deeds, a partition can be made. But in order to be effectual, the partition must be done by mutual deeds.

¹ *Bennett v. Child*, 19 Wis. 364; 1 Washb. on Real Prop. 673. Where there is an express condition against partition, partition cannot be had, for an attempt at it would result in a forfeiture of the estate. *Hunt v. Wright*, 47 N. H. 399. See *Fisher v. Demerson*, 3 Metc. 546. But the condition must be express, and clearly manifest an intention to prevent partition. *Spaulding v. Woodward*, 53 N. H. 573; 16 Am. Rep. 392. But apart from these exceptions, the general rule is, that partition may be had in all joint-estates, joint-tenancies, as well as tenancies in common. *Mitchell v. Starbuck*, 10 Mass. 5; *Potter v. Wheeler*, 13 Mass. 504; *Coleman v. Coleman*, 19 Pa. St. 100; *Holmes v. Holmes*, 2 Jones Eq. 334; *Witherspoon v. Dunlap*, Harper, 390; *Higginbottom v. Short*, 25 Miss. 160.

Parol partition would be void under the Statute of Frauds.¹ Tenants in coparcenary may make an effectual partition by parol, if it is followed by actual possession in severalty, at least in those States where tenancy in coparcenary is recognized.² But although a parol partition will not be effectual and binding upon the parties, yet if it is followed by actual possession, such partition will give to the parties the rights and incidents of exclusive possession, as long as the exclusive possession is permitted to continue. And this exclusive possession, if continued for a sufficient length of time, will ripen into a title under the Statute of Limitations.³ So, also, if one of the co-tenants, relying upon the parol partition, enters into possession, and makes extensive improvements on the part allotted to him, the court, in a subsequent action for partition, in the exercise of a wise discretion, may, and probably would, simply confirm the former parol partition, instead of making any different one.⁴

§ 261. **Involuntary or compulsory partition.** — At common law, no suit for partition of a joint estate could have been sustained against the will of any one of the co-tenants, except in the case of an estate in coparcenary, and it was not until the reign of Henry VIII. that any legal action was provided for compulsory partition. Statutes were then

¹ *Gardiner Man. Co. v. Heald*, 5 Me. 384; *Porter v. Hill*, 9 Mass. 34; *Dow v. Jewell*, 18 N. H. 354; *Wood v. Fleet*, 30 N. Y. 501; *Gratts v. Gratts*, 4 Rawle, 411; *Coles v. Wooding*, 2 Patt. jr. & H. 189; *Slice v. Derrick*, 2 Rich. 627; *Piatt v. Hubbell*, 5 Ohio, 243; *Manley v. Pettee*, 38 Ill. 128; *Wildey v. Barney's Lessee*, 31 Miss. 644.

² 1 Washb. on Real Prop. 676.

³ *Keay v. Goodwin*, 16 Mass. 1; *Jackson v. Harder*, 4 Johns. 202; *Corbin v. Jackson*, 14 Wend. 619; *Gregg v. Blackmore*, 10 Watts, 192; *Lloyd v. Gordon*, 2 Har. & McH. 254; *Slice v. Derrick*, 2 Rich. 627; *Drane v. Gregory*, 3 B. Mon. 619; *Piatt v. Hubbel*, 5 Ohio, 243. In *Manley v. Pettee*, 38 Ill. 128, a parol partition, followed by occupation, has been held to be effectual against creditors and purchasers.

⁴ *Wood v. Fleet*, 36 N. Y. 501.

passed creating the common-law writ of partition.¹ Similar statutes have been passed in the different States.² But apart from the common-law statutory remedies, the court of chancery has, since the reign of Elizabeth, maintained jurisdiction for partition, and this is now the only remedy in England, unless recent statutes have been passed; it exists also in most, if not all, of the States.³ The court of chancery would, after examination by the master, allot particular parcels to each tenant, and make its decree effectual by compelling the parties to execute mutual deeds of conveyance. In the proceedings at common law, the judgment of the court vested the titles in severalty in each party, without the aid of the mutual conveyance.⁴ The action for partition, whether it be in law or in *equity*, is an action *in rem*, and must be brought in the county and State in which the land lies.⁵

§ 262. **Who can maintain action for partition.**—Under the statute 31 Henry VIII., only tenants of a free-

¹ 1 Washb. on Real Prop. 651, 676; Williams on Real Prop. 103.

² The statutes vary in detail, and cannot be given here. For an excellent compendium of these statutes, see Mr. Washburn's note, 1 Washb. on Real Prop. 690, note; 4 Kent's Com. 364. See also, generally, in reference to the common-law remedy, Cook v. Allen, 2 Mass. 462; Champion v. Spence, 1 Root, 147; McKee v. Straub, 2 Binn. 1; Witherspoon v. Dunlap, 1 McCord, 546.

³ 1 Washb. on Real Prop. 677, 678; Williams on Real Prop. 103; Story's Eq. Jur., sect. 647; Moore v. Moore, 47 N. Y. 469; Bailey v. Sissan, 1 R. I. 233; Adams v. Ames Iron Co., 24 Conn. 230; Whitton v. Whitton, 36 N. H. 326; Spitts v. Wells, 18 Mo. 468; Greenup v. Sewell, 18 Ill. 53. But chancery did not entertain a suit for partition, if there was a dispute concerning the title. 4 Kent's Com. 365; 1 Washb. on Real Prop. 678, 679; McCall's Lessee v. Carpenter, 18 How. (U. S.) 297; Hosford v. Merriam, 5 Barb. 51; Obert v. Obert, 10 N. J. Eq. 98; Tabler v. Wiseman, 2 Ohio St. 207; Shearer v. Winston, 33 Miss. 149.

⁴ 1 Washb. on Real Prop. 678; Story's Eq. Jur., sects. 652, 654. But now in most of the States the decree in equity has the same effect as a judgment at law. Hassett v. Ridgley, 49 Ill. 201; Hoffman v. Stigers, 28 Iowa, 302.

⁵ Bonner, Petitioner, 4 Mass. 122; Peabody v. Minot, 24 Pick. 333; Corwith v. Griffing, 21 Barb. 9; Brown v. McMullen, 1 Nott & M. 252.

hold estate of inheritance were empowered to compel a partition, but by statute 32 Henry VIII., the right was extended to tenants for life and for years, but partition between them would not affect the rights of reversioners; and the general rule now is, that partition might be had between the co-tenants of any joint estate, who have the seisin and the immediate right of possession.¹ Partition, therefore, does not lie between tenants who have been disseised,² or who are tenants in remainder or reversion.³ But unsettled claims or encumbrances upon the land, or upon the share of one or more of the co-tenants, in the hands of strangers,—such as a claim of dower, or a mortgage of the premises, where the mortgagee is not in possession,—will not prevent the partition. But in order that the decree in partition shall bind the holders of these claims or encumbrances, existing at the time that the suit for partition is instituted, they must be made parties, in the absence of a statute to the contrary.⁴

¹ 1 Washb. on Real Prop. 680; Co. Lit. 167; *Mussey v. Sandborn*, 15 Mass. 152; *Austin v. R. R.*, 45 Vt. 215; *Riker v. Darkey*, 4 Edw. Ch. 668; *Brownwell v. Brownwell*, 19 Wend. 367; *Call v. Barker*, 12 Me. 320; *Lambert v. Blumenthal*, 26 Mo. 471; *Tabler v. Wiseman*, 2 Ohio St. 207.

² *Bonner v. Kennebeck Purchase*, 7 Mass. 475; *Marshall v. Crehore*, 13 Metc. 462; *Hunnewell v. Taylor*, 6 Cush. 472; *Call v. Barker*, 12 Me. 320; *Miller v. Dennett*, 6 N. H. 109; *Brownell v. Brownell*, 19 Wend. 367; *Bradshaw v. Callaghan*, 8 Johns. 558; *Florence v. Hopkins*, 46 N. Y. 184; *Clapp v. Bromagham*, 9 Cow. 530; *Stevens v. Enders*, 1 Green (N. J.) 271; *Brock v. Eastman*, 28 Vt. 658; *Tabler v. Wiseman*, 2 Ohio St. 207; *Lambert v. Blumenthal*, 26 Mo. 471.

³ *Hodgkinson, Petitioner*, 12 Pick. 374; *Hunnewell v. Taylor*, 6 Cush. 472; *Nichols v. Nichols*, 28 Vt. 228; *Adams v. Ames Iron Co.*, 24 Conn. 230; *Brown v. Brown*, 8 N. H. 93; *Ziegler v. Grim*, 6 Watts, 106; *Tabler v. Wiseman*, 2 Ohio St. 207. In New York and Illinois, there may be a partition of a vested remainder. *Blakely v. Colder*, 15 N. Y. 617; *Hilliard v. Scoville*, 52 Ill. 449. And, likewise, no partition can be had between a living heir and one still unborn, *in ventre sa mere*. *Gillespie v. Nabors*, 59 Ala. 441; 31 Am. Rep. 20.

⁴ *Call v. Barker*, 12 Me. 320; *Mottey v. Blake*, 12 Mass. 280; *Colton v. Smith*, 11 Pick. 311; *Taylor v. Blake*, 109 Mass. 513; *Burhaus*, 2 Barb. Ch. 398; *Bradshaw v. Callaghan*, 8 Johns. 558; *Purvis v. Wilson*, 5 Jones L. 22,

If claimants upon the shares of individual co-tenants have been properly brought before the court, the decree in partition will transfer the lien of the encumbrance to the part allotted to the tenant, whose share in the joint estate was encumbered.¹ If the interest in the co-tenant's share is acquired after the commencement of the suit, the claimant takes the interest subject to the decree in partition, and need not be made a party.²

§ 263. **Partial partition.** — Partition of a part of the joint estate cannot be asked for. The entire estate must be brought in for partition; but two or more of the co-tenants may ask for a decree setting out their shares in common, and apart from the others.³

§ 264. **Manner of allotment.** — Commissioners are generally appointed by the court, whose duty it is to ascertain the best mode of dividing up the estate among the several tenants. And in performing this duty, they are to be guided by the circumstances of each case. If there are several lots or parcels of land, one parcel may be given to each, or, if it is a single tract, it is divided up, if possible, into equal parcels; but if in either case an equal division is impossible, the commissioner may direct the payment of a sum of money, called *owelty of partition*, in order to equalize the partition.⁴ A court of equity may so direct

Harlan v. Stout, 22 Ind. 488; Kilgour v. Crawford, 51 Ill. 249; Butler v. Roys, 25 Mich. 53; 12 Am. Rep. 218; De Uprey v. De Uprey, 27 Cal. 332. And if there is any owelty coming to the mortgagor co-tenant, it must be paid to the mortgagees. Green v. Arnold, 11 R. I. 364; 23 Am. Rep. 466.

¹ 1 Washb. on Real Prop. 682.

² Westervelt v. Huff, 2 Sandf. Ch. 98; Baird v. Corwin, 17 Pa. St. 462.

³ 1 Washb. on Real Prop. 679, Duncan v. Sylvester, 16 Me. 388; Bigelow v. Littlefield, 52 Me. 24; Arms v. Lyman, 5 Pick. 210; Clark v. Parker, 106 Mass. 554; Colton v. Smith, 11 Pick. 511; Ladd v. Perley, 18 N. H. 396.

⁴ Hagar v. Wiswall, 10 Pick. 152; Story's Eq. Jur. 654; 1 Washb. on Real Prop. 678; Green v. Arnold, 11 R. I. 364; 23 Am. Rep. 466.

partition that the tenant, who has made improvements upon the land, may get the benefit of them.¹ But if the estate in question is not susceptible of a partition without destroying the value of the property, as where it is a mill, a wharf, and the like, the property will either be ordered to be sold, and the proceeds of sale divided among the tenants according to their equities, or the entire estate will be vested in one, who will then be required to pay to the others their shares in money. But an actual partition is more favored, and will be ordered, whenever practicable.²

§ 265. **Effect of partition.**—Partition, when completed, vests in each tenant an estate in severalty in the part or parcel allotted to him by agreement of the parties, or by the decree of the court; and the parties cease to be cotenants. But if the partition is made by the decree of a court, there is a sufficient privity of estate remaining between them, as to make the loss by one tenant, of the part allotted to him, through the enforcement of a superior title, a burden upon all. In compulsory partition, each tenant becomes a warrantor of the titles of the others to the extent of his share. And if one is ousted of his share by the claim of a superior title, he may enter upon the share of the others, and ask for a new partition of what remains of the original joint estate.³ But if the parti-

¹ *Green v. Putnam*, 1 Barb. 500; *Wood v. Fleet*, 36 N. Y. 501; *Crafts v. Crafts*, 13 Gray, 360; *Robinson v. McDonald*, 11 Texas, 385; *Dean v. O'Meara*, 47 Ill. 122; *Thorn v. Thorn*, 14 Iowa, 55; *Borah v. Archers*, 7 Dana, 177. But see, *contra*, *Gourley v. Woodbury*, 43 Vt. 89.

² *Miller v. Miller*, 13 Pick. 237; *Adams v. Briggs Iron Co.*, 7 Cush. 361; *King v. Reed*, 11 Gray, 490; *Wood v. Little*, 35 Me. 107; *Morrill v. Morrill*, 5 N. H. 134; *Crowell v. Woodbury*, 52 N. H. 613; *Conant v. Smith*, 1 Aik. (Vt.) 67; *Hills v. Dey*, 14 Wend. 204; *Belknap v. Trimble*, 3 Paige Ch. 577; *Royston v. Royston*, 13 Ga. 425; *Higginbottom v. Short*, 25 Miss. 160; *McGillivray v. Evans*, 27 Cal. 96.

³ 1 Washb. on Real Prop. 689; Co. Lit. 173 b; *Feather v. Strohecker*, 3 Pa. St. 505. See *Campan v. Barnard*, 25 Mich. 382.

tion is by mutual deeds of release, there will be no claim for compensation, unless the partition was tainted with fraud.¹ For this reason, and perhaps for others, it is impossible for one, who has been a co-tenant, to acquire, by purchase after partition, a superior title to the joint estate which he may enforce against his former co-tenants. They may claim the benefit of such purchase by contributing their share of the price or consideration, in the same manner as before partition; and it would seem that this would be the case, whether the partition was voluntary or involuntary.²

Weiser v. Weiser, 5 Watts, 279; *Beardslee v. Knight*, 10 Vt. 185. But where it is necessary that all should join in an action on the covenant of warranty in the conveyance to them, the one who has lost his estate may call upon the others to join him in the action against their common warrantor. *Sawyers v. Cater*, 8 Humph. 256; *Dugan v. Hollins*, 4 Md. Ch. 139; 4 Kent's Com. 470. But now, a tenant in common may sue alone on the general covenant of warranty where the breach affects him alone. *Lamb v. Danforth*, 59 Me. 322; 8 Am. Rep. 426.

¹ *Venable v. Beauchamp*, ³ Dana, 326; Co. Lit. 174 a; 1 Washb. on Real Prop. 688.

CHAPTER IX.

ESTATES UPON CONDITION AND LIMITATION, AND CONDITIONAL LIMITATIONS.

SECTION 271. Definition of an estate upon condition.

272. Words necessary to create an estate upon condition.

273. Conditions precedent and subsequent, further distinguished.

274. Invalid conditions — Impossibility of performance.

275. Invalid conditions — Because of illegality.

276. The time of performance.

277. The effect of the breach of the condition.

278. Waiver of performance.

279. Equitable relief against forfeiture.

280. Estates upon condition, distinguished from trusts.

281. Same — From estates upon limitation, and conditional limitations.

§ 271. **Definition of an estate upon condition.** — This estate is one which is made to vest, to be enlarged or defeated, upon the happening or not happening of some event.¹ If the estate is to be created or enlarged upon the performance of the condition, and not before, it is called a condition *precedent*; if the condition is to defeat an estate already vested, it is a condition *subsequent*. Conditions are also divided into *express* and *implied*. An express condition is, as its name implies, one which is expressly created in the instrument, which limits the estate to which the condition is annexed, and is otherwise called a condition *in deed*; while an implied condition is not expressly declared, but arises by implication of law, and is generally annexed to certain estates as an invariable incident.² The annexation of a condition to an estate does not prevent its alienation or disposition by devise. The only effect is, that the alienee or devisee takes

¹ 2 Washb. on Real Prop. 2; Co. Lit. 201 a.

² 2 Washb. on Real Prop. 3; Co. Lit. 201 a; Vanhorne's Lessee v. Dorrance, 3 Dall. 317.

the estate subject to the possibility of forfeiture by a failure to perform the condition.¹ Nor does the presence of the condition alter the character of the estate, that is, determine whether it is a freehold, or not. Thus an estate to A. for fifty years, provided he lives so long, is a leasehold, and an estate to A. for life, provided he does not live longer than fifty years is a life estate, notwithstanding the first is to terminate with his life, even though the fifty years have not expired, and the second is to terminate with the expiration of the fifty years, although he is still alive.²

§ 272. **Words necessary to create an estate upon condition.** — No particular words or forms of expression are really necessary for the creation of such an estate. Any words, particularly in wills, which show the intention to annex a condition to the estate granted, will be sufficient. Such phrases, however, as “on condition,” “provided,” “if it shall so happen,” etc., are found in constant use, and, if resorted to, will remove any doubt as to the grant being an estate upon condition.³ As intimated, it is more difficult in devises, than in grants, to determine whether they are conditional, and even such phrases as those above mentioned in the case of devises, do not necessarily create an estate upon condition, if from the context the testator appears to have had a contrary intention.⁴

¹ 2 Washb. on Real Prop. 23; *Wilson v. Wilson*, 38 Me. 18; *Underhill v. Saratoga and Washington R. R. Co.*, 20 Barb. 45; *Taylor v. Sutton*, 15 Ga. 103.

² 2 Washb. on Real Prop. 23; Co. Lit. 42 a; *Ludlow v. New York, etc., R. R. Co.*, 12 Barb. 440.

³ 2 Washb. on Real Prop. 3. But it must be expressed in the deed; it cannot be created by parol. *Marshall, etc., School v. Iowa, etc., School*, 23 Iowa, 360. If the right of entry is reserved for the breach of a covenant in the deed, it gives to the covenant the character of a condition and converts the estate into an estate upon condition. *Moore v. Pitts*, 53 N. Y. 85; *Ayer v. Emery*, 14 Allen, 69; *Rawson v. Uxbridge*, 7 Allen, 125; *Waters v. Breden*, 70 Pa. St. 235; *Wheeler v. Walker*, 2 Conn. 201; *Supervisors, etc., v. Patterson*, 50 Ill. 119. See *post*, sect. 863.

⁴ 2 Washb. on Real Prop. 4. See *Wheeler v. Walker*, 2 Conn. 201; *Hay-*

§ 273. **Conditions precedent and subsequent, further distinguished.** — It is not always an easy matter to determine in a given case whether a condition is precedent or subsequent. It is clear that in a grant to A. upon his marriage, or in a lease for ten years, and if he pays a certain sum of money, then to him and his heirs forever, the conditions are precedent; or that in a grant to A. for life, provided she remains a widow, or a grant in fee with a rent reserved, with right of entry upon failure to pay, they are conditions subsequent. But in wills, particularly, great difficulty is sometimes experienced in reaching a definite conclusion on this point. The construction is, of course, governed by the intention of the grantor or deviser, as obtained from the instrument of conveyance. Perhaps the rule for the determination of the character of a condition is best expressed in the words of the court in the case cited below, viz.: “ If the act or condition required do not necessarily precede the vesting of the estate, but may accompany or follow it, and if the act may as well be done after, as before the vesting of the estate; or if, from the nature of the act to be performed, and the time required for its performance, it is evidently the intention of the parties that the estate shall vest, and the grantee perform the act after taking possession, then the condition is subsequent.”¹ But while the courts are inclined, in any case of doubt, to treat

den v. Stoughton, 5 Pick. 528; *Austin v. Cambridgeport Parish*, 21 Pick. 215; *Stuyvesant v. Mayor of N. Y.*, 11 Paige Ch. 427; *Lindsey v. Lindsey*, 45 Ind. 552.

¹ *Underhill v. Saratoga and Washington R. R. Co.*, 20 Barb. 455. See also *Finlay v. King's Lessee*, 3 Pet. 340; *Taylor v. Maxon*, 9 Wheat. 325; *Hayden v. Stoughton*, 5 Pick. 528; *Marwick v. Andrews*, 25 Me. 525; *Austin v. Cambridgeport Parish*, 21 Pick. 215; *Wheeler v. Walker*, 2 Conn. 201; *Van Rensselaer v. Ball*, 19 N. Y. 100; *Barruss v. Madan*, 2 Johns. 145; *Horseys v. Horseys*, 4 Harr. 517; *Waters v. Bieden*, 70 Pa. St. 235; *Jones v. Walker*, 13 B. Mon. 163; *Hunt v. Beeson*, 18 Ind. 382; *Jones v. Doe*, 2 Ill. 276; *Rogan v. Walker*, 1 Wis. 527; *Barksdale v. Elam*, 30 Miss. 694; *Monroe v. Bowen*, 26 Mich. 523.

the condition as subsequent, yet a stricter rule of construction is applied than if the condition is precedent. It must be created by express limitation, or arise by necessary implication, in order to work a forfeiture of an estate already vested.¹ And if the performance of the condition is not expressly imposed upon the heirs and assigns, its breach will not work a forfeiture, if the estate has previously descended to the heirs, or has been conveyed away. In such a case, the estate cannot be forfeited for any breach of the condition, occurring after the grantee has parted with the estate.²

§ 274. **Invalid conditions — Impossibility of performance.** — If the condition is impossible from the beginning, and is for that reason manifestly absurd, or becomes impossible through the act of the grantor, or by the act of God or inevitable accident, the performance will be excused, and the condition held void. Its invalidity, however, would have a different effect upon the estate, according as it is a condition precedent or subsequent. If the condition is precedent, the estate will fail, just as if the condition was valid and had been broken.³ But if it is a condition subsequent, its invalidity would destroy the right of entry and forfeiture in the grantor, and leave the estate in the grantee absolute and free from the condition.⁴

¹ *Láberee v. Carleton*, 53 Me. 213; *Merrifield v. Cobleigh*, 4 Cush. 178; *Bradstreet v. Clark*, 21 Pick. 389; *Hoyt v. Kimball*, 49 N. H. 327; *Ludlow v. N. Y. and Harlem R. R. Co.*, 12 Barb. 440; *Martin v. Ballou*, 13 Barb. 119; *McWilliams v. Nisley*, 2 Serg. & R. 523; *McKelway v. Seymour*, 29 N. J. L. 322; *Gadberry v. Sheppard*, 27 Miss. 203; *Voris v. Renshaw*, 49 Ill. 432; *Board, etc., v. Trustees, etc.*, 63 Ill. 204.

² 2 Washb. on Real Prop. 7, 8; *Emerson v. Simpson*, 43 N. H. 475; *Page v. Palmer*, 48 N. H. 385.

³ *Co. Lit.* 206; *Harvey v. Aston*, 1 Atk. 374; *Taylor v. Mason*, 9 Wheat. 325; *Martin v. Ballou*, 13 Barb. 119; *Vanhorne's Lessee v. Dorrance*, 2 Dall. 317; *Mizell v. Burnett*, 4 Jones L. 249.

⁴ *Co. Lit.* 206 a; *Walker (Am. Law)*, 298; *Brandon v. Robinson*, 18 Ves. 429; *Bradley v. Peixoto*, 3 Ves. 324; *Hughes v. Edwards*, 9 Wheat. 489; *Blackstone Bank v. Davis*, 12 Pick. 42; *Badlam v. Tucker*, 1 Pick. 284; *Mer-*

§ 275. **Invalid conditions — Because of illegality.** — Similar effects would be produced, if the condition is invalid, because of its illegality. A condition is illegal, whenever it involves the performance of an act prohibited by law. Thus a condition, that the grantee shall commit a murder or any other crime, would be void; and, if it is a condition subsequent, the grantee would take an absolute estate. The illegal conditions, most commonly met with, are those restricting marriage and the alienation of a fee simple state by the grantee. An absolute restriction of that kind would be just as invalid as the condition to commit a crime.¹ But if the restriction is only for a limited period, as during minority or coverture, or if it is directed only against certain persons, as that the grantee shall not alien to, or marry, a certain named person or class of persons, it is a good condition and can be enforced.² A condition, restraining the alienation of a life estate or one for years, is valid, even though it is absolute both as to persons and

rill v. Emery, 10 Pick. 507; Taylor v. Sutton, 15 Ga. 103; Jones v. Doe, 2 Ill. 276; Gadberry v. Sheppard, 27 Miss. 203.

¹ Brandon v. Robinson, 18 Ves. 429; Anglesea v. Church Wardens, 6 Q. B. 114; Willis v. Hiscox, 4 Mylne & Cr. 197; Hall v. Tuffts, 18 Pick. 455; Blackstone Bank v. Davis, 21 Pick. 42; Schermerhorn v. Myers, 1 Denio, 448; De Peyster v. Michael, 6 N. Y. 467; Taylor v. Suttin, 15 Ga. 103; Gadberry v. Sheppard, 27 Miss. 203; Bertie v. Falkland, 2 Freem. 222; Walker v. Vincent, 17 Harris, 369; Williams v. Cowden, 18 Mo. 211. But where the estate is granted to a widow during widowhood, it being an estate upon limitation and not an estate upon condition, it is a good limitation, and the estate will terminate upon her marriage. Co. Lit. 42 a; *ante*, sect. 60; Harmon v. Brown, 58 Ind. 207; Coppage v. Alexander's Heirs, 2 B. Mon. 113. But if the devise is for life, or during widowhood, having first given her an estate for life, the subsequent limitation *during widowhood* operates as a condition; it must be construed to be a condition and therefore void. Lloyd v. Lloyd, 2 Sim. (N. S.), 255; Binnerman v. Weaver, 8 Md. 517; Coon v. Bean, 69 Ind. 474; Stillwell v. Knapper, 69 Ind. 558; 35 Am. Rep. 240; *contra*, Walsh v. Mathews, 11 Mo. 131; Dumey v. Schaeffer, 24 Mo. 170.

² Co. Lit. 223 a; 2 Washb. on Real Prop. 9; Hunt v. Wright, 47 N. H. 396; Plumb v. Tobbs, 41 N. Y. 442; McWilliams v. Nisly, 2 Serg. & R. 513; Schackleford v. Hall, 19 Ill. 212; Attwater v. Attwater, 18 Beav. 330; Large's Case, 2 Leon. 82; Stewart v. Brady, 3 Bush. 623.

time.¹ So also will a condition be void, which defeats the estate, if it is appropriated to the payment of the grantee's debts.² But an estate may be limited to determine upon the insolvency or bankruptcy of the grantee; in such a case, however, the estate would be one upon limitation and not upon condition.³

§ 276. **The time of performance.**— If there is a time specified, within which the condition is to be performed, it cannot be performed afterwards. Where there is no express specification of time, it must be determined from the apparent intention of the grantor or testator, as gathered from the context and the nature of the condition. Generally, if the time of performance is not limited, the grantee has his whole life in which to perform. But if a prompt performance appears to have been intended from the use of words in the present tense, or if in any other way an immediate performance is indicated; or if an early performance is necessary, in order that the grantor may obtain the expected benefit, the grantee has only a reasonable time in which to perform. Thus, where an estate was conveyed upon condition, that the grantee should pay a certain mortgage upon the estate, a prompt compliance with the condition was held necessary.⁴

§ 277. **The effect of a breach of the condition.**— If it is a condition precedent, the failure to perform will prevent the estate from taking effect. But if it is a condition subse-

¹ 1 Washb. on Real Prop. 118, 507; 1 Cruise Dig. 108; see *ante* sects. 64, 182. The statute *quia emptores*, which made conditions in restraint of alienation void, only applied to estates in fee.

² Brandon v. Robinson, 18 Ves. 429; Blackstone Bank v. Davis, 21 Pick. 42.

³ See *post*, sect. 503.

⁴ Co. Lit. 208 b; Finlay v. King's Lessee, 3 Pet. 374; Hayden v. Stoughon, 5 Pick. 528; Ross v. Tremain, 2 Metc. 495; Allen v. Howe, 105 Mass. 241; Williams v. Angell, 7 R. I. 152; Stuyvesant v. Mayor of N. Y., 11 Paige ch. 425; Nicoll v. N. Y. & Erie R. R., 13 N. Y. 121; Hamilton v. Elliott, 5 Serg. & R. 875.

quent, the estate is defeated only at the election of the parties who can take advantage of the breach.¹ At common law it was necessary for such a party to enter upon the estate, in order to work a forfeiture. It could not be effected by bringing an action for the recovery of the possession. This rule has been somewhat changed, so that at the present time the ordinary action of ejectment would have the same effect as the common-law entry.² This right of entry need not be expressly reserved where the condition is express. It follows as a necessary incident to the condition and passes with the condition, into whosoever hands it may come.³ Conditions are reserved only to the grantor and his heirs. They cannot be reserved for the benefit of third persons. As a general rule, therefore, only the grantor and his heirs have a right to enter upon condition broken, and they lose their rights, if they should convey away the reversion in them. The right of entry is not an estate, not even a *possibility of reverter*; it is simply a *chose in action*.⁴ And

¹ The breach of the condition does not alone defeat the estate. Webster v. Cooper, 14 How. 501; Tallman v. Snow, 35 Me. 342; King's Chapel v. Pelham, 9 Mass. 501; Hubbard v. Hubbard, 97 Mass. 192; Willard v. Henry, 2 N. H. 120; Warner v. Bennett, 31 Conn. 477; Ludlow v. N. Y. & Harlem R. R., 12 Barb. 440; Canal Co. v. Railroad Co., 4 Gill & J. 121; Phelps v. Chesson, 12 Ired. 194.

² See 1 Prest. Est. 46, 48, 50; Co. Lit. 201 a; 2 Washb. on Real Prop. 13; Goodright v. Cator, Dougl. 485; Duppa v. Mayo, 1 Saund. 287 c, note; 1 Smith Ld. Cas. 89; Doe v. Masters, 2 B. & C. 490; Jones v. Carter, M. & W. 718; Osgood v. Abbott, 58 Me. 73; Sperry v. Sperry, 8 N. H. 77; McKelway v. Seymour, 29 N. J. L. 329; Jackson v. Crysler, 1 Johns. 125; Fonda v. Sage, 46 Barb. 123; Green v. Pettingill, 47 N. H. 375; Austin v. Cambridgeport Parish, 21 Pick. 224; Stearns v. Harris, 8 Allen, 598; Phelps v. Chesson, 12 Ired. L. 194; Chalker v. Chalker, 1 Conn. 79.

³ Osgood v. Abbott, 58 Me. 73; Gray v. Blanchard, 8 Pick. 284; Jackson v. Allen, 3 Cow. 220; Jackson v. Topping, 1 Wend. 388; Bowen v. Bowen, 18 Conn. 535; Wheeler v. Walker, 2 Conn. 201.

⁴ Shulenberg v. Harriman, 21 Wall. 346; Hooper v. Cummings, 45 Me. 359; Gray v. Blanchard, 8 Pick. 284; Merrill v. Harris, 102 Mass. 328; Van Rensselaer v. Ball, 19 N. Y. 103; De Peyster v. Michael, 6 N. Y. 506; Fonda v. Sage, 46 Barb. 122; Michal v. N. Y. & Erie R. R., 12 N. Y. 132; Cross v.

although it has been held that an express condition can be devised with the reversion, and the devisee and his heirs enter for the breach,¹ yet such a condition cannot be aliened or assigned, and does not pass with a grant of the reversion.² This rule against assignment of the right of entry was restricted by the statute, 32 Hen. VIII. ch. 34, to freehold estates upon condition, thus enabling the assignees of the reversion to enforce the forfeiture of leasehold estates for the breach of the condition.³ But if it be a condition in law, or an implied condition, the right of entry was always assignable, it being considered more in the nature of an incident to the right of property, than a separate and independent *chose in action*.⁴ But the condition cannot be apportioned between two or more assignees of separate portions of the reversion, and it will be destroyed by such dissection of the reversion.⁵ If the grantor is in possession of the property at the time of the breach, no act of entry

Carson, 8 Blackf. 138; Co. Lit. 201 a, Butler's note, 84; 2 Washb. on Real Prop. 13-15.

¹ This appears to be a local rule in Massachusetts. *Hayden v. Stoughton*, 5 Pick. 528; *Clapp v. Stoughton*, 10 Pick. 463; *Austin v. Cambridgeport, Parish*, 21 Pick. 215. See *contra*, *Avelyn v. Ward*, 1 Ves. sr. 422; *Southard v. Central R. R.*, 26 N. J. L. 21; *Cornelius v. Ivins*, 25 N. J. L. 386. See also *Webster v. Cooper*, 14 How. (U. S.) 501; *Nicoll v. N. Y. & Erie R. R.*, 12 N. Y. 121; *Henderson v. Hunter*, 59 Pa. St. 341; *Jones v. Roe*, 3 T. R. 388.

² Co. Lit. 214 a; *Hooper v. Cummings*, 45 Me. 359; *Gray v. Blanchard*, 8 Pick. 284; *Guild v. Richards*, 16 Gray, 309; *Gibert v. Peteler*, 38 N. Y. 165; *Nicoll v. N. Y. & Erie R. R.*, 12 Barb. 461; s. c. 12 N. Y. 132; *Warner v. Bennett*, 31 Conn. 478; *Norris v. Milner*, 20 Ga. 563; *Torop v. Johnson*, 3 Ind. 343; *Cross v. Carson*, 8 Blackf. 138; *Smith v. Brannan*, 13 Cal. 107.

³ Co. Lit. 215 a; 1 Washb. on Real Prop. 476; *Fenn v. Smart*, 12 East. 444; *Lewes v. Ridge*, Cro. Eliz. 863; *Nicoll v. N. Y. & Erie R. R.*, 12 Barb. 461; s. c. 12 N. Y. 132; *Van Rensselaer v. Ball*, 19 N. Y. 102; *Burden v. Thayer*, 3 Metc. 76; *Trask v. Wheeler*, 7 Allen 111; *Plumleigh v. Cook*, 13 Ill. 669.

⁴ 2 Washb. on Real Prop. 13; Co. Lit. 214.

⁵ Co. Lit. 215 a; Taylor's L. & T. sect. 296; *Wright v. Burroughs*, 3 Martn. Gr. & S. 700; *Doe v. Lewis*, 5 Ad. & El. 277; s. c. 31 Eng. C. L. 277; *Cruger v. McLaury*, 41 N. Y. 225.

is required of him, in order to defeat the estate. But if he is out of possession, he must enter, or do acts equivalent to entry, with the express intention of thereby working a forfeiture. Entry without such an intention would have no effect.¹ The right of entry may be exercised, even though the breach of the condition has worked no material injury to the grantor. And he can exercise it, notwithstanding he may have other equally effective remedies.²

§ 278. **Waiver of performance.** — If the party, who is entitled to the right of entry, waives the performance by an actual release of the condition or by an express license, the condition is gone, and he cannot take advantage of any subsequent breach. But a mere acquiescence, without actual license, would only constitute a waiver of the present breach, and the right of entry for subsequent breaches would survive.³ This waiver may result from acts, as well as from agreements. Thus if there is a condition attached to a lease against its assignment, the subsequent acceptance of rent from the assignee, or the beginning of an action for rent accruing after the breach, will constitute a waiver of the breach.⁴ But mere delay in making the entry will not

¹ *Andrews v. Senter*, 32 Me. 394; *Williard v. Henry*, 2 N. H. 120; *Rolins v. Riley*, 44 N. H. 13; *Bowen v. Bowen*, 18 Conn. 535; *Hamilton v. Elliott*, 5 Serg. & R. 375. And where he is in possession, his retention of possession after the breach will not necessarily work a forfeiture. He may, even under such circumstances, waive the breach, and thus prevent a forfeiture. *Guild v. Richards*, 16 Gray, 317; *Hubbard v. Hubbard*, 97 Mass. 192.

² *Gray v. Blanchard*, 8 Pick. 284; *Stuyvesant v. Mayor of N. Y.*, 11 Paige Ch. 414; 2 Washb. on Real Prop. 17, 18.

³ 2 Washb. on Real Prop. 19; Co. Lit. 211 b; *Andrews v. Senter*, 32 Me. 397; *Gray v. Blanchard*, 8 Pick. 284; *Hubbard v. Hubbard*, 97 Mass. 192; *Doe v. Gladwin*, 6 Q. B. (51 Eng. C. L.) 953; *Guild v. Richards*, 16 Gray, 326; *Doe v. Jones*, 5 Exch. 498; *Doe v. Peck*, 1 B. & Ad. (20 Eng. C. L.) 428; *Chalker v. Chalker*, 1 Conn. 79; *Jackson v. Crysler*, 1 Johns. 126.

⁴ *Hubbard v. Hubbard*, 97 Mass. 192; *Coon v. Brecket*, 2 N. H. 153; *Chalker v. Chalker*, 1 Conn. 79; *Jackson v. Crysler*, 1 Johns. 126. But it has been held, and perhaps it is the better opinion, that in order that the ac-

have the effect of a waiver, unless such apparent acquiescence is sufficient to induce the grantee to incur expenses, and the subsequent exercise of the right of entry would in consequence work a legal fraud upon him. Thus, where in a grant to a railroad the condition was, that the road should be finished within a certain time; the grantor stood by and acquiesced in the continuance of the work after the expiration of the time stipulated, and the right of entry was held to be waived under the doctrine of estoppel. But, except in special cases like this, only affirmative acts and express agreements by the grantor will have the effect of a waiver.¹

§ 279. **Equitable relief against forfeiture.**—As a general proposition, equity will neither relieve against, nor enforce, a forfeiture. It simply leaves the parties to their remedies at law. Where the breach is the result of an unlooked-for accident, and where the damages resulting therefrom can be accurately estimated by the court, as where the condition calls for the payment of a sum of money at a particular time, it may be a mortgage, or a rent reserved, equity will prevent a forfeiture and decree, instead thereof, as compensation in damages, the payment of the sum of money, together with interest for the time which has elapsed.² But if the condition be some act, collateral to

acceptance of rent may constitute a waiver of forfeiture for non-payment of rent, it must be rent accruing after the breach. *Jackson v. Allen*, 3 Cow. 220; *Hunter v. Osterhoudt*, 11 Barb. 33; *Price v. Worwood*, 4 H. & N. 512; *Green's Case*, Cro. Eliz. 1; *s. c.* 1 Leon. 262. See *Downes v. Turner*, 2 Salk. 597; *Dumpor's Case*, 4 Rep. 119; *s. c.*, 1 Smith's Ld. Cas., note.

¹ *Dudlow v. N. Y. & Harlem R. R.*, 12 Barb. 440. See *Williams v. Dakin*, 22 Wend. 209; *Jackson v. Crysler*, 1 Johns. 126; *Sharon Iron Co. v. City of Erie*, 41 Pa. St. 349; *Gray v. Blanchard*, 8 Pick. 284; *Doe v. Gladwin*, 6 Q. B. (51 Eng. C. L.) 953; *Doe v. Peck*, 1 B. & Ad. (20 Eng. C. L.) 428; *Doe v. Jones*, 5 Exch. 498.

² *Goodtitle v. Holdfast*, 2 Strange, 900; *Hill v. Barclay*, 18 Ves. 56; *Stone v. Ellis*, 9 Cush. 95; *Atkins v. Chilson*, 11 Mete. 112; *Hancock v. Carlton*, 6 Gray, 39; *Bethlehem v. Annis*, 40 N. H. 34; *City Bank v. Smith*, 3 Gill & J.

the grant, and one which cannot be estimated in damages, as where the condition is to repair, or against the acquisition of rights of easement by third parties; or where the breach is not the result of inevitable accident, but is wilfully or negligently committed, equity will not interfere.¹

§ 280. **Estate upon condition distinguished from trusts.** — It is sometimes difficult in devises, to ascertain whether the testator intended to create an estate upon condition, or one upon trust. If he intended the former, there can be no relief against forfeiture, "except as already explained, nor can performance of the condition be enforced. But if an estate upon trust was intended, and what appeared to be conditions were directions to trustees, explanatory of what they should do with the estate, a failure to perform would not result in an absolute forfeiture, but a court of equity would interpose in behalf of the *cestui que trust* and enforce a performance of those acts, which were intended for his benefit. The conclusion in every case depends upon the ascertained intention of the testator, and the devise will in proper cases be declared upon trust, instead of upon condition, though the words, "provided," "on condition," etc., are used in that connection.²

§ 281. **Same — From estates upon limitation and conditional limitations.** — An estate upon limitation is one which is made to determine absolutely upon the happening

265; *Skinner v. Dayton*, 2 Johns. Ch. 526; *Warner v. Bennett*, 31 Conn. 478; *Williams v. Angell*, 7 R. I. 152; *Beatey v. Harkey*, 2 Smed. & M. 563.

¹ *Hill v. Barclay*, 18 Ves. 56; *Descarlett v. Dennett*, 9 Mod. 22; *Elliott v. Turner*, 13 Sim. Ch. 485; *Wafer v. Mocato*, 9 Mod. 112; *Reynolds v. Pitt*, 2 Price, 212; *Hancock v. Carlton*, 6 Gray, 39; *Henry v. Tupper*, 29 Vt. 56; *Dunkley v. Adams*, 20 Vt. 415; *Bacon v. Huntington*, 14 Conn. 92; *Skinner v. Dayton*, 2 Johns. Ch. 526; *Livingston v. Thompson*, 4 Johns. Ch. 431; *Baxter v. Lansing*, 7 Paige Ch. 350; *City Bank v. Smith*, 3 Gill & J. 265.

² *Stanly v. Colt*, 5 Wall. (U. S. 165). See *Linsee v. Mixer*, 101 Mass. 512; *Dorr v. Hallaran*, *Ib.*, 534.

of some future event as an estate to A., so long as she remains a widow. The technical words, generally used to create a limitation, are conjunctions relating to time, such as *during, while, so long as, until*, etc. But these words are not absolutely necessary; for where it is necessary, in order to carry out the intent of the grantor, to construe an estate to be a limitation, it will be done, even though words, ordinarily used in the creation of an estate upon condition, appear in their stead.¹ An estate upon limitation differs from one upon condition in this, that the estate is determined *ipso facto* by the happening of the contingency, and does not require any entry by the grantor in order to defeat it.² A conditional limitation is an estate limited to take effect upon the happening of the contingency, and which takes the place of the estate which is determined by such contingency. Some authors, among others, Mr. Washburn, have used the terms conditional limitations and limitations interchangeable, referring in both instances to the estate, which is determined by the happening of the event.³ But it appears to be the better method to apply the term *conditional limitation* to the estate which takes effect, and *limitation* to the estate which is determined.⁴ Using the

¹ 1 Prest. Est. 129; Co. Lit. 203 b; Mary Portington's Case, 10 Rep. 42; Chapin v. Harris, 8 Allen, 594; Ashley v. Warner, 11 Gray, 43; Owen v. Fields, 102 Mass. 105; Miller v. Levi, 44 N. Y. 489; Henderson v. Hunter, 59 Pa. St. 340.

² 2 Bla. Com. 155; 1 Prest. Est. 456; 2 Washb. on Real Prop. 23, 26; Stearns v. Godfrey, 16 Me. 158; Fifty Associates v. Howland, 11 Metc. 102; Proprietors, etc., v. Grant, 3 Gray, 142; Attorney-General v. Merrimack Co., 14 Gray, 612; Owen v. Field, 102 Mass. 105; Miller v. Levi, 44 N. Y. 489; Wheeler v. Walker, 2 Conn. 196; Henderson v. Huntington, 59 Pa. St. 340.

³ 2 Washb. 23, 26.

⁴ Mr. Washburn quotes from Watkins on Conveyancing, to this effect: "Between a condition and a conditional limitation there is this difference: a condition respects the destruction and determination of an estate; a conditional limitation relates to the commencement of a new one. A condition brings the estate back to the grantor or his heirs; a conditional limitation carries it over to a stranger." Watkins, Convey. 204. A conditional limita-

term *conditional limitation* as indicating a future estate which is to take effect in derogation of a preceding limitation, it may be stated here in general *terms*, to be more clearly explained in subsequent pages, that it was unknown to the common law. The only common-law future estate, which can be created by the same deed with a prior limitation, is a remainder, and as a remainder cannot be limited, which takes effect in derogation of the preceding estate, conditional limitations are not recognized by the common-law. They can only be created as a shifting use, or an executory devise.¹

tion is an estate limited to take effect after the determination of an estate, which in the absence of a limitation over would have been an estate upon condition. Strictly speaking, a conditional limitation cannot be limited after an estate upon limitation. Thus in a grant to A. during widowhood, and upon her marriage to B., A.'s estate would be an estate upon limitation, and in consequence B.'s estate would be a good common-law remainder. 2 Washb. on Real Prop. 563; Fearne Cont. Rem. 5, 10. See *post*, sect. 412.

¹ 2 Washb. on Real Prop. 26, 28; 4 Kent's Com. 128; 1 Prest. Est. 50. See *post*, sects. 398, 418, 536, 537.

CHAPTER X.

MORTGAGES.

- SECTION I. *Nature and Classification of Mortgages.*
II. *The rights and liabilities of Mortgagors and Mortgagees.*
III. *Remedies and remedial rights incident to a mortgage.*

SECTION I.

NATURE AND CLASSIFICATION OF MORTGAGES.

- SECTION 287. Definition.
288. Mortgages by deposit of title deeds.
289. Continued — Notice to subsequent purchasers.
290. Continued — Their recognition in this country.
291. Continued — Foreclosure.
292. Vendor's lien.
293. Continued — Discharge or waiver of the lien.
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295. Vendee's lien.
296. Mortgage at common law.
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298. Welsh mortgage.
299. Equity of redemption.
300. The mortgage in equity.
301. Influence of equity upon the law.
302. The form of a mortgage.
303. Execution of the defeasance.
304. Form of defeasance.
305. Agreements to repurchase.
306. The defeasance clause in equity.
307. The admissibility of parol evidence.
308. Contemporaneous agreements.
309. Subsequent agreements.
310. The mortgage debt.
311. Mortgages for the support of the mortgagee.
312. What may be mortgaged.

§ 287. **Definition.** — A mortgage is an interest in lands, given to secure the payment of a sum of money or money's equivalent. It incumbers the title of the land and enables the creditor or obligee to satisfy his claim by a sale of the land, or by a forfeiture of the land to the mortgagee. Before explaining the character and incidents of the common-law mortgage, which will constitute the principal subject of the present chapter, reference will be made to several kinds of incumbrances upon land, which, although generally called mortgages, are not strictly such. The first of these is the —

§ 288. **Mortgage by deposit of title deeds.** — This is an ancient security for debt, which at one time was in general use in England, and even now is employed there to some extent. By the deposit of the title deeds of a tract of land with the creditor, it secured to him in equity a lien upon the land for the amount of the debt. It was looked upon in equity as an agreement to execute a mortgage which would be enforced against the depositor and all other persons claiming under him, except subsequent purchasers and incumbrancers for value and without notice.¹ Although it has been strongly objected to, as violating the Statute of Frauds, it is now definitely settled in England that the mortgage by deposit of title deeds does not come within the operation of the statute.² The mere possession by the creditor of the

¹ Story's Eq. Jur. sect. 1020; 2 Washb. on Real Prop. 83; 4 Kent's Com. 150, 151; Russell v. Russell, 1 Bro. C. C. 269; Ex parte Langstone, 17 Ves. 280; Pain v. Smith, 2 Myl. & K. 417; Mandeville v. Welch, 5 Wheat. 277; Roberts v. Craft, 24 Beav. 223; Edge v. Worthington, Cox, 211; Ex parte Corning, 9 Ves. Jr. 115; Carey v. Rawson, 8 Mass. 159; Jarvis v. Dutcher, 16 Wis. 307.

² Whitbread, ex parte, 19 Ves. 209; Haigh, ex parte, 11 Ves. 403; Ex parte Hooper, 19 Ves. 477; Norris v. Wilkinson, 19 Ves. 192; Russell v. Russell, 1 Bro. C. C. 269. In Pennsylvania, a written agreement must accompany the deposit of the title deeds, in order that the transaction may create a mortgage. Luch's Appeal, 44 Pa. St. 519; Edwards v. Trumbull, 50 Pa. St. 509.

debtor's muniments of title will not raise for the former a lien upon the land. They must have been deposited with him with the express intention of providing a lien, in order that the possession may have that effect.¹ But it is not necessary that all the title deeds in the chain of title should be deposited. A single title deed would be sufficient as against the depositor, and it would only be invalid as to those, who were fairly misled by the fact that the mortgagor or depositor was in possession of the other deeds.² And as against the mortgagor and all others claiming under him with notice, the mere agreement to deposit the title-deeds as security would suffice to make the debt an equitable charge upon the estate, if it be evidenced by some writing.³

§ 289. **Continued — Notice to subsequent purchasers.**— If the subsequent purchaser for value has received no notice of the existence of this equitable mortgage, it cannot be enforced against him and the land in his hands. What will be sufficient notice to such a purchaser would depend upon the circumstances of each particular case. In England, where there is no registration law, and the purchaser is accustomed to depend upon the original title deeds in investigating the title to lands, the absence of these deeds or of any of them would constitute sufficient notice to put the purchaser on his inquiry. But the burden of proof is on the equitable mortgagee to show that the purchaser has

¹ *Norris v. Wilkinson*, 12 Ves. 162; *Bozon v. Williams*, 3 Y. & J. 150; *James v. Rice*, 23 Eng. L. & E. 567; *Chapman v. Chapman*, 3 Eng. L. & E. 70; *s. c.*, 13 Beav. 308; *Ex parte Bruce*, 1 Rose, 374; *Ex parte Wright*, 19 Ves. 258; *Ex parte Langston*, 17 Ves. 227; *Lucas v. Darren*, 7 Taunt. 278; *Mandeville v. Welch*, 5 Wheat. 277; *Story's Eq. Jur.*, sect. 1020. If the intention is declared by a memorandum in writing, it cannot be controlled by parol evidence. *Ex parte Coombe*, 17 Ves. 369; *Baynard v. Woolley*, 20 Beav. 583.

² *Ex parte Chippendale*, 2 Mont. & A. 299; *Ex parte Wetherall*, 11 Ves. 398; *Lacon v. Allen*, 3 Drew. 582; *Roberts v. Crofty*, 24 Beav. 253; *s. c.*, 2 De G. & J. 1.

³ *Edwards, ex parte*, 1 Deac. 611; 4 Kent's Com. 151.

received notice of the mortgage.¹ In this country, however, where all deeds of conveyance are required to be recorded, in order to give constructive notice to subsequent purchasers, actual notice of the deposit of the deeds must be brought to such purchasers, in order to bind the land in their hands. The purchaser in this country is not required to look beyond the record for the evidences of title.²

§ 290. Continued.— **Their recognition in this country.**— The equitable mortgage by deposit of title deeds is recognized in some of the States of this country, but in view of the general prevalence of the recording law, it is at best a very inefficacious kind of security. It can never be relied upon, and is rarely, if ever at the present day, met with in practice. Its value as a security is destroyed, as soon as the land has been sold or mortgaged to one having no actual notice of the deposit. And it being a purely equitable interest, not even an equitable estate, the mortgagee cannot have any instrument of notice recorded for the purpose of giving constructive notice of its existence. The mortgage is, however, recognized in Maine, Rhode Island, New York, New Jersey, South Carolina, Georgia, Wisconsin, and in the United States Courts.³ While in Pennsylvania, Ver-

¹ *Herrick v. Atwood*, 25 Beav. 212; *Colyer v. Finch*, 5 H. L. Cas. 924; *Ex parte Hardy*, 2 Deac. & C. 363; *Hiern v. Mill*, 13 Ves. 114; *Hewitt v. Loosemore*, 9 Eng. L. & E. 35; *Head v. Egerton*, 3 P. Wis. 279; *Adam's*, Eq. 123; *Story's Eq. Jur.*, sect. 1020; *Jones, Mortg.*, sect. 179.

² *Story's Eq. Jur.*, sect. 1020; *Jones, Mortg.*, sect. 179; *Hall v. McDuff*, 24 Me. 311; *Whitworth v. Gangain*, 3 Hare, 416; *Berry v. Mutual Ins. Co.*, 2 Johns. Ch. 604; *Luch's Appeal*, 44 Pa. St. 522; *Edwards v. Trumbull*, 50 Pa. St. 612; *Probasco v. Johnson*, 2 Disney, 96; *Walker*, Am. Law. 315.

³ *Hall v. McDuff*, 24 Me. 311; *Hackett v. Reynolds*, 4 R. I. 512; *Rockwell v. Hobby*, 2 Sandf. Ch. 9; *Robinson v. Urquhart*, 1 Deas. 523; *Stoddard v. Hart*, 23 N. Y. 561; *Mounce v. Byars*, 16 Ga. 469; *Gothard v. Flynn*, Miss. 58; *Williams v. Stratton*, 10 Smed. & M. 118; *Welsh v. Usher*, 2 Hill (S. C.) 166-170; *Jarvis v. Dutcher*, 16 Wis. 307; *Mandeville v. Welch*, 5 Wheat. 277; *Chase v. Peck*, 21 N. Y. 581.

mont, Kentucky, Ohio and Tennessee, the doctrine has been repudiated.¹

§ 291. **Continued. — Foreclosure.** — Since the mortgage by deposit of title deeds is only an equitable lien, it can be enforced only in a court of equity, and it is a matter of doubt in the English courts, whether the decree should be for foreclosure, or simply direct a sale of the premises, and the application of the proceeds to the liquidation of the debt. But the latter English cases hold that the mortgagee of such a mortgage is possessed of the same rights of foreclosure as any other mortgagee.²

§ 292. **Vendor's lien.** — This is also an equitable lien recognized in favor of the vendor as a security for the purchase-money. It is founded on the equitable theory that, until the payment of the purchase-money, the vendee holds the land as trustee of the vendor for the purpose of a security. No agreement is necessary for its creation; it is presumed to exist, until the contrary is shown.³ This lien has been generally recognized

Shitz v. Dieffenback, 3 Pa. St. 233; *Bowers v. Oyster*, 3 Pa. St. 233; *Strauss' Appeal*, 49 Pa. St. 258; *Kauffelt v. Bower*, 7 Serg. & R. 64; *Bicknell v. Bicknell*, 31 Vt. 498; *Van Meter v. McFaddin*, 8 B. Mon. 438; *Meador v. Meador*, 3 Heisk. 562; *Probasco v. Johnson*, 2 Disney, 96. But in Pennsylvania, if the deposit is accompanied by an instrument, declaring the purpose of the deposit, it will be a good, equitable mortgage. *Luch's Appeal*, 44 Pa. St. 522; *Edwards v. Trumbull*, 56 Pa. St. 512.

² *Adams Eq.* 125; *Pain v. Smith*, 2 M. & K. 417; *Parker v. Housefield*, *Id.* 419; *Brocklehurst v. Jessop*, 7 Sim. 438; *Moore v. Choat*, 8 *Id.* 508; *Price v. Carver*, 3 M. & C. 157; *Lister v. Turner*, 5 Hare, 281; *Tuckley v. Thompson*, 1 Johns. & H. 126; *James v. James*, L. R. 16 Eq. 153; *Redmagne v. Forster*, L. R. 2 Eq. 467. In *Jarvis v. Dutcher*, 16 Wis. 307, it was held that the decree should be for a sale of the premises. Otherwise the question does not seem to have been passed upon by the courts of this country.

³ *Walker Am. Law*, 315; *Mackreth v. Symmons*, 15 Ves. 339; *Chapman v. Tanner*, 1 Vern. 267; *Blackburn v. Gregson*, 1 Bro. C. C. 420; *Payne v. Atterbury*, Harr. (Mich.) 414; *Warren v. Fenn*, 28 Barb. 334; *Wilson v. Lyon*, 51 Ill. 166; *Truebody v. Jacobson*, 2 Cal. 269; *Dodge v. Evans*, 43

in the states of this country, but has been denied in some.¹ The decisions differ as to details, but agree in respect to the general features of such a lien. The vendor's lien is

Miss. 570; *Schnebley v. Ragan*, 7 Gil. & J. 120; *Ahrend v. Odiorne*, 118 Mass. 266; *Kauffelt v. Bower*, 7 Serg. & R. 64; *Story's Eq. Jur.*, sect. 1217.

¹ Recognized in Alabama: *Gordon v. Bell*, 50 Ala. 213; *Wood v. Sullens*, 44 Ala. 686. In Arkansas: *Shall v. Ciscoé*, 18 Ark. 142; *Lavender v. Abbott*, 30 Ark. 192. California: *Salmon v. Hoffman*, 2 Cal. 138; *Gallagher v. Mars*, 50 Cal. 23; Colorado: *Francis v. Wells*, 2 Cal. 660; Dist. of Columbia: *Ford v. Smith*, 1 McArthur, 592. Florida: *Bradford v. Marvin*, 2 Fla. 463. Illinois: *Dyer v. Martin*, 4 Scam. 148; *Keith v. Horner*, 42 Ill. 524; *Kirkham v. Boston*, 67 Ill. 599; *Moshier v. Meek*, 80 Ill. 79. Indiana: *Deibler v. Barwick*, 4 Blackf. 339; *Yaryan v. Shriner*, 26 Ind. 364. Iowa: *Grapengether v. Fejervary*, 9 Iowa, 163; *Johnson v. McGrew*, 42 Iowa, 555; see Rev. Stat. Iowa (1873), sect. 1940. Kentucky: *Thornton v. Knox*, 6 B. Mon. 74; *Tiernan v. Thurman*, 14 B. Mon. 277. Maryland: *Magruder v. Peter*, 11 Gill & J. 217; *Carr v. Hobbs*, 11 Md. 285. Michigan: *Carroll v. Van Rensselear, Harr.* (Mich.) 225; *Payne v. Avery*, 21 Mich. 524. Minnesota: *Silby v. Stanley*, 4 Minn. 65; *Duke v. Balme*, 16 Minn. 306. Mississippi: *Dodge v. Evans*, 43 Miss. 570; *Davidson v. Allen*, 36 Miss. 419. Missouri: *March v. Turner*, 4 Mo. 253; *Delassus v. Poston*, 19 Mo. 425; *Pratt v. Clark*, 57 Mo. 189. New Jersey: *Van Doren v. Todd*, 2 Green (N. J.) 397; *Carlies v. Howland*, 26 N. J. Eq. 311. New York: *Warner v. Van Alstyne*, 3 Paige, 513; *Chase v. Peck*, 21 N. Y., 581; *Stafford v. Van Rensselaer*, 9 Cow. 316; *Garson v. Green*, 1 Johns. Ch. 308; *Smith v. Smith*, 9 Abb. Pr. (N. S.) 420. Ohio: *Williams v. Roberts*, 5 Ohio, 35; *Anketel v. Converse*, 17 Ohio St. 11. Oregon: *Pease v. Kelly*, 3 Ore. 417. Tennessee: *Eskridge v. McClure*, 2 Yerg. 84; *Ross v. Whitson*, 6 Yerg. 50. Texas: *Briscoe v. Bronaugh*, 1 Texas 326; *Yarborough v. Wood*, 42 Texas, 91. Wisconsin: *Tobey v. McAllister*, 9 Wis. 643; *Williard v. Reas*, 26 Wis. 540. Denied and repudiated in Kansas: *Simpson v. Mundee*, 3 Kansas, 172; *Smith v. Rowland*, 13 Kansas 245. Maine: *Gilman v. Brown*, 1 Mason, 192; *Philbrook v. Delano*, 29 Me. 410. Massachusetts: *Wright v. Dame*, 5 Metc. 603; *Ahrens v. Odiorne*, 118 Mass. 261. North Carolina: *Womble v. Battle*, 3 Ired. Eq. 182; *Cameron v. Mason*, 7 Ired. Eq. 180. Pennsylvania: *Kauffelt v. Bower*, Serg. & R. 64; *Zentmeyer v. Mittower*, 5 Pa. St. 403; *Stephen's Appeal*, 38 Pa. St. 9. South Carolina: *Wragg v. Compt. Gen.*, 2 Desau. 509. Left in doubt in Connecticut: *Atwood v. Vincent*, 17 Conn. 575; *Watson v. Wells*, 5 Conn. 468; *Chapman v. Beardsley*, 31 Conn. 115. New Hampshire: *Arlin v. Brown*, 44 N. H. 102. Rhode Island: *Perry v. Grant*, 10 R. I. 334. While in Georgia, Vermont, Virginia, and West Virginia, although upheld judicially, it is now abolished by statute, except that in the last two States, it may be reserved on the face of the deed of conveyance. Ga. Code, 1873, sect. 1997; *Jones v. Jones*, 56 Ga. 325; *Mounce v. Byars*, 16 Ga. 469; Stat. of 1851 (Vt.), ch 47; *Manly v. Slason*, 21 Vt. 271. Code Va.,

binding upon the vendee, and all persons claiming under him who had notice of the lien or who are not purchasers for value. A volunteer to whom the land is conveyed without consideration, a widow with her dower, and the heirs and devisees, cannot plead the want of notice as a defence.¹ The decisions, however, are not uniform in determining to what extent the vendor's lien will be enforced against creditors of the purchaser, who are not charged with notice. It is certain that it will prevail against an assignment for the benefit of creditors, if the vendor enforces his lien by filing a bill in equity, before the assignee executes the trust.² But where the conveyance is direct to the creditor, or the land is attached under levy of execution issued upon a judgment against the vendee, the courts generally hold that the lien will not prevail.³ In respect to what constitutes notice of the vendor's lien, it may be stated that any notice,

1873, ch. 115, sect. 1; *Wade v. Greenwood*, 2 Robt. 475. W. Va. Code, 1870, ch. 75, sect. 1. See also *Bayley v. Greenleaf*, 7 Wheat. 46; *Chilton v. Braiden*, 2 Black, 458; *McLean v. McLean*, 10 Pet. 625; *Gilman v. Brown*, 4 Wheat. 254.

¹ *Pintard v. Goodloe*, 1 Hempst. 527; *Webb v. Robinson*, 14 Ga. 16; 2. *Garson v. Green*, 1 Johns. Ch. 308; *Amory v. Reilley*, 9 Ind. 490; *Upshaw v. Hargrove*, 8 Smed. & M. 286; *Fisher v. Johnson*, 5 Ind. 492; *Crane v. Palmer*, 8 Blackf. 12; *Williams v. Wood*, 1 Humph. 408; *Besland v. Hewitt*, 11 Smed. & M. 164; *Nazareth v. Lowe*, 1 B. Mon. 257; *Ellicott v. Welch*, 2 Bland, 242; *Warner v. Van Alstyne*, 3 Paige Ch. 513; *Newton v. McLean*, 41 Barb. 285; *Cole v. Scott*, 2 Wash. (Va.) 141; *Bayley v. Greenleaf*, 7 Wheat. 46; *Duval v. Bibb*, 4 Hen. & M. 113; *Shirley v. Sugar Refin. Co.*, 2 Edw. Ch. 505; *McHendry v. Reilly*, 13 Cal. 75.

² *Brown v. Vanlier*, 7 Humph. 239; *Shirley v. Sugar Refinery*, 2 Edw. Ch. 505; *Repp v. Repp*, 12 Gill & J. 341; *Truebody v. Jacobson*, 2 Cal. 269; *Pearce v. Foreman*, 29 Ark. 563; *Green v. Demoss*, 10 Humph. 371; *Walton v. Hargroves*, 42 Miss. 18; *Warren v. Fenn*, 28 Barb. 333; *Corlies v. Howland*, 26 N. J. Eq. 311; *Bowles v. Rogers*, 6 Ves. 95.

³ *Bayley v. Greenleaf*, 7 Wheat. 46; *Aldridge v. Dunn*, 7 Blackf. 249; *Taylor v. Baldwin*, 10 Barb. 626; *Webb v. Robinson*, 14 Ga. 216; *Gaun v. Chester*, 5 Yerg. 205; *Roberts v. Rose*, 2 Humph. 145; *Roberts v. Salisbury*, 3 Gill & J. 425; *Cook v. Banker*, 50 N. Y. 655; *Johnson v. Cawthorne*, 1 Dev. & B. Eq. 32; *Adams v. Buchanan*, 49 Mo. 64; *Allen v. Loring*, 34 Iowa, 499; *Porter v. City of Dubuque*, 20 Iowa, 440.

which is sufficient to put a reasonable man upon his inquiry will charge the purchaser with knowledge of the existence of the lien. Thus the vendor's possession, or a recital in the deed that the consideration has not been paid, would be sufficient notice to bind the land in the purchaser's hands.¹

§ 293. **Continued — Discharge or waiver of the lien.** — Since this lien is raised in favor of the vendor on the theory that he is without remedy in a court of law, and the lien is necessary to prevent his incurring the loss of both the land and the purchase-money; if the vendor shows by any act that he does not rely upon the vendor's lien for protection, the land will vest in the vendee, discharged of the lien. The reservation of the lien depends upon the intention of the parties. In the absence of any evidence to the contrary, the law presumes that it was their intention to reserve the lien. This presumption may, however, be rebutted. An express agreement, that the lien shall not be reserved, will, of course, have that effect; and the general rule in all other cases is, that nothing less than the acceptance of some other security will constitute a waiver of the lien. Such would be a mortgage or pledge of the same or other property, or a note with surety or indorser. The execution of an invalid mortgage on the same land would not discharge the lien. Nor would a mere change in the form of the vendee's in-

¹ *McRimmons v. Martin*, 14 Texas 318; *Tiernan v. Thurman*, 14 B. Mon. 277; *Honore v. Bakewell*, 6 B. Mon. 67; *Daughady v. Paine*, 6 Minn. 452; *Hopkins v. Garrard*, 6 B. Mon. 66; *Thorpe v. Dunlap*, 4 Heisk. 674; *Briscoe v. Bronaugh*, 1 Tex. 326; *Frail v. Ellis*, 17 Eng. L. & Eq. 457; *Hamilton v. Fowlkes*, 16 Ark. 340; *Manly v. Glason*, 21 Vt. 271; *Wilson v. Lyon*, 51 Ill. 166; *Baum v. Grisby*, 21 Cal. 176; *Thornton v. Knox*, 6 B. Mon. 74; *Woodward v. Woodward*, 7 B. Mon. 116; *Kilpatrick v. Kilpatrick*, 23 Miss. 124; *Parker v. Foy*, 43 Miss. 260; *McAlpine v. Burnett*, 23 Texas, 649; *Melross v. Scott*, 18 Ind. 250; *Mounce v. Byars*, 11 Ga. 180; *Cordova v. Hood*, 17 Wall. 1; *Masich v. Shearer*, 49 Ala. 226.

debtedness, such as the acceptance of the vendee's bond, note, or check.¹

§ 294. **Continued — In whose favor raised.** — It is doubtful if any one but the vendor and his heirs can claim the benefit of this lien. It certainly does not enure to a third person, who pays the consideration at the request of the purchaser.² And whether it is assignable with the vendor's claim for the purchase-money is a matter of great doubt. There are decisions in support of both positions, but the better opinion is, that the lien is personal to the vendor and cannot be assigned, unless the right is expressly reserved by the parties, when it will have all the characteristics of an express lien, and will pass with the assignment.³

¹ *Honore v. Bakewell*, 6 B. Mon. 67; *Mims v. Macon and West*, R. R. Co., 3 Ga. 333; *Mimms v. Lockett*, 23 Ga. 237; *Winter v. Anson*, 3 Russ. 488; *Teed v. Carruthers*, 2 Younge & C. Ch. 31; *Hughes v. Kearney*, 1 Sch. & L. 136; *Dubois v. Hull*, 43 Barb. 25; *Richardson v. Ridgely*, 8 Gill & J. 87; *White v. Dougherty*, 1 Mart. & Y. 309; *Young v. Wood*, 11 B. Mon. 123; *Manly v. Slason*, 21 Vt. 277; *Tobey v. McAllister*, 9 Wis. 463; *Mattix v. Weand*, 19 Ind. 151; *Hummer v. Schott*, 21 Md. 311; *Hadley v. Pickett*, 23 Ind. 452; *Boon v. Murphy*, 6 Blackf. 272; *Williams v. Roberts*, 5 Ohio, 35; *Mayham v. Coombs*, 14 Ohio, 428; *Wilson v. Graham*, 5 Munf. 297; *Foster v. Trustees*, 3 Ala. 302; *Marshall v. Christmas*, 3 Humph. 616; *Conover v. Warner*, 1 Gilm. 493; *Gilman v. Brown*, 1 Mason, 191; *s. c.*, 4 Wheat. 255; *Burger v. Potter*, 32 Ill. 66; *Lagow v. Badollett*, 1 Blackf. 416; *Phelps v. Conover*, 25 Ill. 314; *Campbell v. Baldwin*, 2 Humph. 248; *Baum v. Grigsby*, 21 Cal. 175; *Cowl v. Varnum*, 37 Ill. 181; *Richards v. Leaming*, 27 Ill. 137; *Cordova v. Hood*, 17 Wall. 1; *Anthony v. Smith*, 9 Humph. 508; *Hurlock v. Smith*, 39 Wis. 436; *Clark v. Hunt*, 3 J. J. Marsh. 553; *Phillips v. Saunderson*, 1 Smed. & M. 462; *Redford v. Gibson*, 12 Leigh, 332; *Adams v. Buchanan*, 49 Mo. 64; *Dudley v. Dickson*, 14 N. J. Eq. 252; *Durette v. Briggs*, 47 Mo. 356; *Kirkham v. Boston*, 67 Ill. 599; *Fish v. Howland*, 1 Paige, 20; *Vail v. Foster*, 4 N. Y. 312; *Morri v. Pate*, 31 Mo. 315; *Linville v. Savage*, 58 Mo. 248; *Hare v. Van Deusen*, 32 Barb. 92; *Mackreth v. Symmons*, 15 Ves. 342; *Austen v. Halsey*, 6 Ves. sr. 483.

² *Stansell v. Roberts*, 3 Ohio, 148; *Skaggs v. Nelson*, 25 Miss. 88; *Crane v. Caldwell*, 14 Ill. 468; *Nolte's Appeal*, 45 Pa. St. 361; *Brown v. Budd*, 2 Ind. 442.

³ It is held to be non-assignable in Arkansas, California, Georgia, Illinois, Iowa, Maryland, Mississippi, Missouri, New York, North Carolina, Ohio, Ten-

§ 295. **Vendee's lien.** — Where the vendee has paid any part of the purchase-money on the faith of the contract of sale before a conveyance has been made to him, equity gives him a lien upon the title of the vendor for the amount so advanced, which has all the characteristics of the vendor's lien, and is enforceable in the same way against the vendor and all his privies who have notice.¹ Both the vendor's

nessee. *Carlton v. Buckner*, 28 Ark. 66; *Hutton v. Moore*, 26 Ark. 396; *Baum v. Grigsby*, 21 Cal. 172; *Ross v. Heintzen*, 36 Cal. 313; *Webb v. Robinson*, 14 Ga. 216; *Wellborn v. Williams*, 9 Ga. 86; *Keith v. Horner*, 32 Ill. 524; *Dickenson v. Chase*, 1 Morris, 492; *Crow v. Vance*, 4 Iowa, 436; *Moshier v. Meek*, 80 Ill. 79; *Dixon v. Dixon*, 1 Md. Ch. 220; *Inglehart v. Armiger*, 1 Bland, 519; *Pitts v. Parker*, 44 Miss. 247; *Walker v. Williams*, 30 Miss. 165; *Adams v. Cowherd*, 30 Mo. 458; *White v. Williams*, 1 Paige, 502; *Smith v. Smith*, 9 Abb. Pr. (N. S.) 420; *Green v. Crockett*, 2 Dev. & B. Eq. 390; *Jackman v. Hallock*, 1 Ohio, 318; *Brush v. Kinsley*, 14 Ohio, 20; *Thorpe v. Dunlap*, 4 Heisk. 674; *Green v. DeMoss*, 10 Humph. 371; *Stratton v. Gold*, 40 Miss. 780; *Hallock v. Smith*, 3 Barb. 267; *Graham v. McCampbell*, Meigs, 52; *Tanner v. Hicks*, 4 Smed. & M. 294; *Norvell v. Johnson*, 5 Humph. 489; *Eskridge v. McClure*, 2 Yerg. 84; *Gann v. Chester*, 5 Yerg. 205; *Sheratz v. Nicodemus*, 7 Yerg. 9; *Briggs v. Hill*, 6 How. (Miss.) 362; *Moreton v. Harrison*, 1 Bland, 491; *Shall v. Biscoe*, 18 Ark. 162. While in Alabama, Indiana, Kentucky, and Texas, the lien is held to be assignable. *Wells v. Morrow*, 38 Ala. 125; *Griggsby v. Hair*, 25 Ala. 327; *Fisher v. Johnson*, 5 Ind. 492; *Nichols v. Glover*, 41 Ind. 24; *Honore v. Bakewell*, 6 B. Mon. 67; *Ripperdon v. Cozine*, 8 B. Mon. 465; *White v. Downs*, 40 Texas, 225; *Moore v. Raymond*, 15 Texas, 554. And in some of the States, where it is generally held that the lien is not assignable with the debt, a distinction is made between a transfer by sale of the debt, and a deposit of the debt as security for the vendor's indebtedness. In the latter case it is held that the pledgee may assert the vendor's lien in his own behalf. *Carlton v. Buckner*, 28 Ark. 66; *Hallock v. Smith*, 3 Barb. 272; *Crowley v. Riggs*, 24 Ark. 563. The assignment of the note or other instrument of indebtedness of the vendee does not discharge the lien although the lien does not pass to the assignee, as long as the vendor is liable as indorser or guarantor. He may enforce it for his own benefit. *Kelly v. Payne*, 18 Ala. 371; *White v. Williams*, 1 Paige, 502; *Lindsey v. Bates*, 42 Miss. 397; *Turner v. Horner*, 29 Ark. 440; *Smith v. Smith*, 9 Abb. Pr. (N. S.) 420. In Missouri it is held that the assignment of note for purchase money will pass the vendor's lien to the assignee, where the vendor retains the legal title, and has only conditioned for the execution of a deed upon payment of the purchase money. *Adams v. Cowherd*, 30 Mo. 458.

¹ *Burgess v. Wheate*, 1 W. Bl. 150; *Mackreth v. Symmons*, 15 Ves. 352; *Payne v. Atterbury*, Harr. Ch. 414; *Ætna Ins. Co. v. Tyler*, 16 Wend. 385;

and the vendee's liens are enforced by a bill in equity; and if the debt cannot be liquidated in any other way, the court will order the property to be sold, or so much of it as is necessary, and the proceeds of sale applied to the satisfaction of the debt. But in order that the property might be subjected to the lien, the action must be brought directly for that purpose. It cannot be enforced in any collateral suit.¹

§ 296. **Mortgage at common law.** — A common law mortgage is a conveyance of an estate in lands, upon condition that it will be defeated by the payment of the debt or the performance of the obligation, to secure which the conveyance was made. The conveyance is a security, and for that purpose the mortgagee is given a defeasible estate, which is to become absolute upon the failure of the mortgagor to perform the condition. It is a species of estate upon condition subsequent, and grew out of the doctrine

Lowell v. Middlesex Ins. Co., 8 Cush. 127; *Shirley v. Shirley*, 7 Blackf. 452; *Chase v. Peck*, 21 N. Y. 585; *Hope v. Stone*, 10 Minn. 151; *Taft v. Kessel*, 16 Wis. 273; *Wickman v. Robinson*, 14 Wis. 493; *Cooper v. Merritt*, 30 Ark. 686; *Stewart v. Wood*, 63 Mo. 252; *Brown v. East*, 5 Mon. 407; *Lane v. Ludlow*, 6 Paige, 316, note; 2 Story Eq. Jur., sect. 1216.

¹ *Wilson v. Davison*, 2 Robt. 384; *Mullikin v. Mullikin*, 1 Bland, 538; *Eskridge v. McClure*, 2 Yerg. 84; *Clark v. Bell*, 2 B. Mon. 1; *Williams v. Young*, 17 Cal. 406; *Converse v. Blumrick*, 14 Mich. 124; *Payne v. Harrell*, 40 Miss. 498; *Clark v. Hunt*, 3 J. J. Marsh. 558; *Jones v. Conde*, 6 Johns. Ch. 77; *Ely v. Ely*, 6 Gray, 439; *Codwise v. Taylor*, 4 Sneed, 346; *Burger v. Potter*, 32 Ill. 66; *Milner v. Ramsey*, 48 Ala. 287; *Emison v. Risque*, 9 Bush, 24; *Edwards v. Edwards*, 5 Heisk. 123. In some of the States, the lien-holder must exhaust his remedy at law before he can file a suit in equity to enforce his lien. *Roper v. McCook*, 7 Ala. 318; *Battorf v. Conner*, 1 Blackf. 287; *Ford v. Smith*, 1 McArthur, 592; *Pratt v. VanWyck*, 5 Gill & J. 495. In Maryland it has now been changed by statute. Gen. Laws, Md. (1860), p. 99. And in other States, the vendor or vendee may enforce his lien although he may have a complete remedy at law. *Bradley v. Bosley*, 1 Barb. Ch. 125; *Dubois v. Hull*, 43 Barb. 26; *Stewart v. Caldwell*, 54 Mo. 536; *Pratt v. Clark*, 57 Mo. 189; *Campbell v. Roach*, 45 Ala. 667; *Richardson v. Baker*, 5 J. J. Marsh. 323.

of those estates.¹ The common-law mortgage is to be distinguished from two kinds of securities, which once were used quite extensively in Great Britain, viz.: *vivum vadium* and the Welsh mortgage.

§ 297. **Vivum vadium.**— This was also an estate granted to the creditor for the purpose of securing the payment of a debt. But it is to be distinguished from the mortgage or *vadium mortuum*, in that the debt was to be satisfied out of the rents and profits of the estate. The grantee in the *vadium vivum* invariably took possession of the premises. Transfer of possession was a necessary incident, whereas, as we shall presently have occasion to observe, the common-law mortgage does not require a change of possession, although it may take place. In the mortgage, also, if the mortgagor fails to discharge his obligation, the title becomes absolute in the mortgagor, while in the *vadium vivum* it never does, but reverts to the grantor, so soon as the grantee shall have paid himself out of the rents and profits of the estate.²

§ 298. **Welsh mortgage.**— This mortgage was one, in which the distinguishing feature was, that the mortgagee always entered into possession and appropriated the rents and profits of the estate in payment of interest on the debt. The mortgagee could neither compel the mortgagor to pay the principal, nor foreclose the mortgage and acquire the absolute estate. The mortgagor could pay or not as he chose, but until payment of the principal, he could not exercise any of the rights of an owner over the land.³ Both the

¹ 2 Washb. on Real Prop. 34; 4 Kent's Com. 136; Jones on Mortg., sect. 4; Williams on Real Prop. 422; Erskine v. Townsend, 2 Mass. 493; Mitchell v. Burnham, 44 Me. 299; Wing v. Cooper, 37 Vt. 179; Lund v. Lund, 1 N. H. 39.

² Jones on Mortg., sect. 2; 4 Kent's Com. 137; 2 Bla. Com. 157; Co. Lit. 5.20

³ 4 Kent's Com. 137; Jones on Mortg., sect. 3; Howell v. Price, 1 P. Wms. 291; Lonquet v. Scawen, 1 Ves. sr. 402; 2 Washb. on Real Prop. 37.

vadium vivum and the Welsh mortgage have fallen into disuse, and they are mentioned only as curiosities in legal literature.

§ 299. **Equity of redemption.** — If the mortgagor in a common law mortgage failed to perform the condition at the time stipulated, the estate became absolute in the mortgagee, even though the estate may have been worth much more than the mortgage debt.¹ There was no remedy by which the mortgagor could enforce the acceptance of payment after the breach of the condition, even where his failure arose from some accident or unavoidable delay, or where the payment of the debt with interest to date of the tender of payment would do no injury to the mortgagee. This rigorous rule of the common law did not fail to be productive of great injustice in many instances, and like all cases of hardships resulting from the technicality of the common law it attracted the attention of the Court of Chancery. A long contest ensued between these courts from the time of the *magna charta* until the reign of James I., when Chancery acquired jurisdiction over questions arising out of mortgages, and decreed that the mortgagor may become entitled to redeem his estate from the mortgagee, after condition broken, by the payment of the debt and interest; and in the reign of Charles I. the law of mortgages was firmly established as a branch of equity jurisprudence.² This right of the mortgagor to redeem the estate after the breach of the condition was recognized only in a court of equity. The legal estate, as viewed from the legal stand-

¹ 2 Washb. on Real Prop. 35; 4 Kent's Com. 140; Fay v. Cheney, 14 Pick. 399; Brigham v. Winchester, 1 Metc. 390; Wood v. Trask, 7 Wis. 566; Goodall's Case, 5 Rep. 96; Wade's Case, 5 Rep. 115; Jones on Mortg., sect. 11.

² 1 Spence Eq. Jur. 603; Jones on Mortg., sect. 6; How v. Viguers, 1 Rep. in Ch. 32; Emanuel College v. Evans, *Ib.* 18; 2 Washb. on Real Prop. 39; Roscarriek v. Barton, 1 Ca. in Ch. 217; Casborne v. Scarfe, 1 Atk. 603; Willett v. Winnelly, 1 Vern. 488; Price v. Perrie, 2 Freem. 258.

point, was still considered absolute in the mortgagee, and discharged of all rights of the mortgagor. The right to redeem was therefore no estate in the land. It was simply an equity, and hence was called the EQUITY OF REDEMPTION.

§ 300. **The mortgage in equity.**—As a result of this equitable jurisdiction, mortgages assumed in equity a different character from what they had in law. Equity seized hold of the real intention of the parties, and construed the mortgage to have only the effect of a lien, instead of vesting a defeasible estate in the land. This equitable construction conforms more nearly to the purposes and desired effect of a mortgage. It is given only to secure the payment of a debt, or the performance of some obligation, and its ends are satisfied, if after condition broken means are provided to the mortgagee for satisfying his claim by an appropriation of the land, while in the *interim* his interests are protected against any subsequent conveyance of the land. All this is attained by a lien. Equity, therefore, held the mortgage to be a lien upon the land, and not an estate in it.¹

§ 301. **Influence of equity upon the law.**—As soon as equity assumed jurisdiction over mortgages, it began to exert a potent influence over the law in respect to that class of interests, and has in the course of time almost entirely superseded the courts of law in their jurisdiction. This is specially true in regard to the foreclosure of mortgages. Although in some of the States the common-law foreclosure

¹ *Headley v. Goundray*, 41 Barb. 282; *Jackson v. Willard*, 4 Johns. 41; *Green v. Hart*, 1 Johns. 580; *Kinna v. Smith*, 2 Green Ch. 14; *Hughes v. Edwards*, 9 Wheat. 500; *Runyan v. Mersereau*, 11 Johns. 534; *Deedly v. Cadwell*, 19 Conn. 218; *Eaton v. Whiting*, 3 Pick. 484; *Ellison v. Daniels*, 11 N. H. 280; *Anderson v. Baumgartner*, 27 Mo. 80; *Whitney v. French*, 25 Vt. 663; *Ragland v. Justices*, 10 Ga. 65; *Myers v. White*, 1 Rawle, 353; *Hannah v. Carrington*, 18 Ark. 85; *McMillan v. Richards*, 9 Cal. 365; *Matthews v. Wallwyn*, 4 Ves. 118; *Timms v. Shannon*, 19 Md. 296; 4 Kent's Com. 138.

still prevails in a modified form, yet in most of them, and in England, it has given way to the more practicable and just foreclosure in equity.¹

Not only has equity supplanted the jurisdiction of courts of law in respect to foreclosure, but it has everywhere, in England and in this country, produced, through a legislation judicial and statutory, greater or less influence upon the legal theories in regard to the interest of the mortgagor and the mortgagee. In some of the States the modifications effected by equity are but slight and pertain only to minor details, while the mortgage is still held to be a conveyance of an estate in the land. Such is the law in Maine, Massachusetts, New Hampshire, Connecticut, Rhode Island, Vermont, North Carolina, Mississippi, Alabama, Missouri, Indiana, and Minnesota. In others the mortgage is still considered a conveyance of an interest corresponding to an estate, while the mortgagee possesses in the estate only such rights and remedies as are recognized in a court of equity. The ordinary legal rights of ownership do not attach. Such will be found to be the law in Pennsylvania, South Carolina, Texas, Kentucky, Ohio, Illinois, Iowa, and Wisconsin. This class approximates so nearly to the next class to be mentioned, that in the subsequent discussion of the rights of the mortgagor and mortgagee, they will be treated as constituting one subdivision, so far at least as general rules are concerned. In the last class of States, namely in New York, Georgia, and California, the whole common law theory has been repudiated, and the mortgage is construed to be simply a lien upon the land conveying no legal estate, not even after condition broken.² This general statement of the change which the law of mortgages has undergone, and is still undergoing, for in most of the States it is still in a state of transition, will serve to explain why,

¹ 2 Washb. on Real Prop. 98; 4 Kent's Com. 181; See *post*, sect. 358

² 2 Washb. on Real Prop. 100-108; Jones on Mortg., sects. 17-60.

in the presentation of the law, so much difficulty is experienced in attaining perspicuity of statement and a reconciliation of authorities. This fact must ever be borne in mind, that, although in all the States the law is developing into the lien-theory so-called, yet the development in some is not as advanced as in others. In the consultation of authorities, therefore, in order to ascertain the law in any particular State, only such cases may be referred to with safety, as are found in those States which are in the same state of development. It is to be further remembered that even the decisions from these States can only be relied upon as furnishing general rules of analogy. The details of the law of mortgages must be sought for in the reports of the State, in which the question arises.

§ 302. **The form of a mortgage.** — The mortgage consists of a deed, similar in terms to the ordinary deed of conveyance, conveying the estate to the mortgagee, but qualified by a defeasance clause, in which it is provided that the conveyance shall be void, when the condition, usually the payment of money, is performed, and shall become absolute in the mortgagee upon breach of the condition. Generally, any deed which appears upon its face to have been intended as a security for the payment of money, will be construed as a mortgage.¹ If the instrument does not

¹ Co. Lit. 205 a, Butler's note, 96; Hughes v. Edwards, 9 Wheat. 489; Morris v. Nixon, 1 How. 118; Russell v. Southard, 12 How. 139; Bigelow v. Topliff, 25 Vt. 273; Steel v. Steel, 4 Allen, 419; Gilson v. Gilson, 2 Allen, 115; Parks v. Hall, 2 Pick. 211; Nugent v. Riley, 1 Metc. 117; Vanderhaize v. Hughes, 13 N. J. 244; James v. Morey, 2 Cow. 246; Hodges v. Tenn. Marine, etc., Ins. Co., 8 N. J. 416; Conway v. Alexander, 7 Cranch. 218; Howe v. Russell, 36 Me. 115; Stoever v. Stoever, 9 Serg. & R. 434; Bk. of Westminster v. Whyte, 1 Md. Ch. 536; s. c., 3 Md. Ch. 503; Mende v. Delaire, 2 Desau. 564; Yarborough v. Newell, 10 Yerg. 376; Delahay v. McConnell 4 Scam. 156; Flagg v. Mann, 2 Sumn. 386; Edington v. Harper, 3 J. J. Marsh. 353; Davis v. Stonestreet, 4 Ind. 101; Gibson v. Eller, 13 Ind. 124; Henry v. Davis, 7 Johns. Ch. 40; M'Brayer v. Roberts, 2 Dev. Eq. 75; Hau-

conform to the legal requirements for the execution of a deed, as where the seal has been neglected, or the proper number of attesting witnesses is not obtained, the deed will be inoperative as a mortgage at law, and it is believed generally in equity. But in some of the States, such an imperfect mortgage has been treated in equity as imposing a lien upon the land for the benefit of the creditor which partakes of the same nature as a mortgage by deposit of title deeds.¹

§ 303. **Execution of the defeasance.** — The defeasance clause is usually found in the same deed, which conveys the estate; but this is not necessary. It is very often contained in a separate instrument executed and delivered by the grantee or mortgagee to the grantor or mortgagor. In such a case, however, the instrument must be under seal, in order to have at law the power of converting the apparently absolute deed of conveyance into a mortgage.² It

ser v. Lash, 2 Dev. & B. Eq. 212; *Clark v. Henry*, 2 Cow. 324; *Woodworth v. Guzman*, 1 Cal. 203; *Wilson v. Drumrite*, 21 Mo. 325; *Cotterell v. Long*, 20 Ohio, 464; *English v. Lane*, 1 Port. 328; *Chowning v. Cox*, 1 Rand. 306; *Rogan v. Walker*, 1 Wis. 527; *Burnside v. Terry*, 45 Ga. 621; *Mason v. Moody*, 26 Miss. 184; 4 Kent's Com. 461; *Newman v. Samuels*, 17 Iowa, 528.

¹ *Coe v. Columbia, etc., R. R. Co.*, 10 Ohio St. 372; *Price v. Cutts*, 29 Ga. 142-148; *McQuie v. Rag*, 58 Mo. 56; *Daggett v. Rankin*, 31 Cal. 321; *McClurg v. Phillips*, 49 Mo. 315; *Burnside v. Wayman*, 48 Mo. 356; *Harrington v. Fortner*, 58 Mo. 468; *Dunn v. Raley*, 58 Mo. 134; *Lake v. Doud*, 10 Ohio, 515; *Abbott v. Godfrey*, 1 Mann. (Mich.) 198; *Jones v. Brewington*, 58 Mo. 565; *Black v. Gregg*, 58 Mo. 505.

² *Bodwell v. Webster*, 13 Pick. 411; *Harrison v. Trustees*, 12 Mass. 459; *Flint v. Sheldon*, 13 Mass. 443; *Richardson v. Woodbury*, 48 Me. 206; *Adams v. Stevens*, 49 Me. 362; *Warren v. Lovis*, 53 Me. 464; *French v. Sturdivant*, 8 Greenl. 246; *Lund v. Lund*, 1 N. H. 39; *Dey v. Dunham*, 2 Johns. Ch. 191; *Baker v. Wind*, 1 Ves. sr., 160; *Perkins v. Dibble*, 10 Ohio, 433; *Whitney v. French*, 25 Vt. 663; *Kent v. Allbritain*, 5 Miss. 317; *Baldwin v. Jenkins*, 23 Miss. 206; *Lane v. Shears*, 1 Wend. 433; *Stoever v. Stoever*, 9 Serg. & R. 434; *Houser v. Lamont*, 55 Pa. St. 311; *Plato v. Roe*, 14 Wis. 453; *Preschbaker v. Feaman*, 32 Ill. 475; *Sharkey v. Sharkey*, 47 Mo. 543; *Clark v. Lyon*, 46 Ga. 203; *Copeland v. Yoakum*, 38 Mo. 349; *Baxter v. Dear*, 24

must either be executed at the same time or subsequently in pursuance of an agreement entered into at the time of conveyance. And as a general rule, although it is not necessary that the deed and the defeasance should bear the same date or be executed at the same time, they must be delivered at the same time. Delivery of the defeasance is essential to its full legal operation.¹

§ 304. **Form of the defeasance.** — No particular form is necessary, provided the deed clearly shows the intention of the parties that the instrument shall have the effect of a mortgage. And wherever the condition in a deed is the payment of money, the presumption of law is always in favor of its being treated as a mortgage. Any agreement under seal, therefore, which provides for the contingent avoidance of a deed of conveyance, or calls for the reconveyance of the estate, upon the payment of a sum of money within the prescribed time, will be a defeasance deed and will make the deed of conveyance a mortgage. And where the relation of debtor and creditor existed, any such agreement would be held to create a mortgage, although the parties did not intend that that should be the effect of the

Texas, 17; *Crasson v. Swoveland*, 22 Ind. 427; *Hill v. Edwards*, 11 Minn. 22; *Marshall v. Stewart*, 17 Ohio, 356; *Robinson v. Willoughby*, 65 N. C. 520; *Enos v. Sutherland*, 11 Mich. 538; *Archambau v. Green*, 21 Minn. 520; *Freeman v. Baldwin*, 13 Ala. 246; *Edington v. Harper*, 3 J. J. Marsh. 353; *Hammonds v. Hopkins*, 3 Yerg. 525; *Clark v. Henry*, 2 Cow. 324.

¹ *Bennoch v. Whipple*, 12 Me. 340; *Bodwell v. Webster*, 13 Pick. 411; *Scott v. McFarland*, 13 Mass. 309; *Lund v. Lund*, 1 N. H. 49; *Kelly v. Thompson*, 7 Watts, 401; *Reitenbaugh v. Ludwick*, 31 Pa. St. 131; *Hale v. Jewell*, 7 Greenl. 435; *Holmes v. Grant*, 8 Paige Ch. 243; *Bryant v. Cowart*, 21 Ala. 9; *Sweetland v. Swetland*, 3 Mich. 482; *Harrison v. Phillip's Academy*, 12 Mass. 450; *Newhall v. Bart*, 7 Pick. 157; *Colwell v. Woods*, 3 Watts, 188; *Kelley v. Thompson*, 7 Watts, 401; *Scott v. Henry*, 13 Ark. 112; *Nugent v. Riley*, 1 Mete. 117; *Crane v. Bonnell*, 1 Green Ch. 264; *Wilson v. Shoenberger*, 31 Pa. St. 295; *McIntier v. Shaw*, 6 Allen, 83; *McLaughlin v. Shepherd*, 32 Me. 143; *Brown v. Holyoke*, 53 Me. 9; *Kelleran v. Brown*, 4 Mass. 443; *Haines v. Thompson*, 70 Pa. St. 434; *Preschbaker v. Feaman*, 32 Ill. 475; *Bickford v. Daniels*, 2 N. H. 71.

transaction.¹ Such agreements or defeasance deeds or clauses are to be distinguished from

§ 305. **Agreements to re-purchase,** — Which very often bear a close resemblance to each other. The difference in the legal effect of the two is very great. If the agreement be merely to repurchase upon certain specified terms, or at the time stipulated, a failure to comply with the terms of the agreement destroys the right to repurchase, and the grantor has no equity of redemption, of which he can afterward avail himself in a court of equity. If it is a defeasance, he has that right, the conveyance being a mort-

¹ *Nugent v. Riley*, 1 Metc. 117; *Hebron v. Centre Harbor*, 11 N. H. 571; *Holmes v. Grant*, 8 Paige Ch. 243; *Lanfair v. Lanfair*, 18 Pick. 299; *Austin v. Downer*, 25 Vt. 558; *Stewart v. Hutchings*, 13 Wend. 485; *Carey v. Rawson*, 8 Mass. 159; *Gilson v. Gilson*, 2 Allen, 115; *Hicks v. Hicks*, 5 Gill & J. 75; *Breckenridge v. Auld*, 1 Robt. 148; *Read v. Gaillard*, 2 Desau. 552; *Harrison v. Lemon*, 3 Blackf. 51; *Carr v. Holbrook*, 1 Mo. 240; *Belton v. Avery*, 2 Root, 279; *Marshall v. Stewart*, 17 Ohio, 356; *Pugh v. Holt*, 27 Miss. 461, *Batty v. Snook*, 5 Mich. 231; *Gillis v. Martin*, 2 Dev. Eq. 470; *Ogden v. Grant*, 6 Dana, 473; *Coldwell v. Woods*, 3 Watts, 188; *Kunkle v. Wolfersberger*, 6 Watts, 126; *Watkins v. Gregory*, 6 Blackf. 113; *Peterson v. Clark*, 15 Johns. 205, *Rice v. Rice*, 4 Pick. 349. In some of the States a separate deed of defeasance is required to be recorded, in order to convert an absolute deed into a mortgage, as against every one except the maker. *Tomlinson v. Monmouth Ins. Co.* 47 Me. 232; 2 Comp. Laws Mich. (1871), p. 1346; 1 Minn. Stat. at Large, (1873), p. 640; *Russell v. Waite*, Walk. 31. But where such is not the law, any other notice, actual or constructive, suffices to bind subsequent purchasers. If they have no notice of the defeasance at all, the deed as to them will be an absolute conveyance. *Newhall v. Pierce*, 5 Pick. 450; *Parrington v. Pierce*, 38 Me. 447; *Walton v. Crowley*, 14 Wend. 63; *Brown v. Dean*, 3 Wend. 208; *James v. Johnston*, 6 Johns. Ch. 417; *Friedley v. Hamilton*, 17 Serg. & R. 70; *Harrison v. Trustees*, 12 Mass. 456; *Knight v. Dyer*, 57 Me. 177; *Dey v. Dunham*, 2 Johns. Ch. 182; *Wyatt v. Stewart*, 34 Ala. 716; *Halsey v. Martin*, 22 Cal. 645; *Henderson v. Pilgrim*, 22 Texas, 475. And where they are both recorded they must show for themselves, that they are parts of the same transaction, in order that the record may be constructive notice to purchasers. *Weide v. Gehl*, 21 Minn. 449; *Hill v. Edwards*, 11 Minn. 22; *King v. Little*, 1 Cush. 436. Possession by the grantor is not notice of a defeasance deed held by him. *Newhall v. Pierce*, 5 Pick. 450, *Hennessey v. Andrews*, 6 Cush. 170; *Kunkle v. Wolfersberger*, 6 Watts. 126; *Crassen v. Swoveland*, 22 Ind. 434. See *contra*, *Daubenspeck v. Platt*, 22 Cal. 330; *Pritchard v. Brown*, 4 N. H. 397.

gage. Wherever a doubt exists whether the agreement is one to repurchase or a defeasance, the courts are inclined to the latter construction. And where the relation between the parties is that of debtor and creditor, and the intention of the parties, as shown on the face of the deed, is that the agreement should operate as a security for the debt, the presumption becomes conclusive that the agreement is a defeasance. And generally, under such circumstances, parol evidence will not be admissible to rebut this presumption, although such evidence is freely admitted to rebut the contrary presumption.¹ Each case, however, must depend upon its own circumstances, and the question finally becomes one of fact, whether it was intended that the agreement should operate as a defeasance or as a conditional sale.²

¹ 2 Cruise Dig. 74; 4 Kent's Com. 144; *Kelly v. Thompson*, 7 Watts, 401; *Wing v. Cooper*, 37 Vt. 179; *Trucks v. Lindsay*, 18 Iowa, 505; *Trull v. Skinner*, 17 Pick. 216; *Page v. Foster*, 7 N. H. 392; *Conway v. Alexander*, 7 Cranch, 218; *Flagg v. Mann*, 14 Pick. 483; *Weathersly v. Weathersly*, 40 Miss. 469; *Pearson v. Seay*, 35 Ala. 612; *Rich v. Doane*, 35 Vt. 125; *DeFrance v. DeFrance*, 34 Pa. St. 385; *Watkins v. Gregory*, 6 Blackf. 113; *Rice v. Rice*, 4 Pick. 349; *Haines v. Thompson*, 70 Pa. St., 438; *Woodson v. Wallace*, 22 Pa. St. 171; *Peterson v. Clark*, 15 Johns. 205; *Robinson v. Cropsey*, 2 Edw. Ch. 138; *s. c.* 6 Paige, 480; *Brown v. Dewey*, 1 Sandf. Ch. 56; *Hughes v. Sheaff*, 19 Iowa, 335; *Sears v. Dixon*, 33 Cal. 326; *Poindexter v. McCannon*, 1 Dev. Eq. 373; *Davis v. Stonestreet*, 4 Ind. 191; *Heath v. Williams*, 30 Ind. 495; *Cornell v. Hall*, 22 Mich. 377; *Pennington v. Hanby*, 4 Munf. 140; *Henly v. Hotaling*, 41 Cal. 22; *Snyder v. Griswold*, 37 Ill. 216; *McCarron v. Cassidy*, 18 Ark. 34; *Montgomery v. Chadwick*, 7 Iowa, 114; *Kearney v. McComb*, 16 N. J. Eq. 189; *Glover v. Payne*, 19 Wend. 518. But if the debt is an old one, and the intention of the parties is to pay the debt by the conveyance, the agreement to repurchase will not convert the deed into a mortgage, as it would if the conveyance was intended as a security for the conveyance. *Glover v. Payne*, 19 Wend. 518; *French v. Sturdivant*, 8 Me. 246; *Hillhouse v. Dunning*, 7 Conn. 143; *Murphy v. Parifay*, 52 Ga. 480; *Slowey v. McMurray*, 27 Mo. 113; *O'Neill v. Capelle*, 62 Mo. 202; *Honore v. Hutchings*, 8 Bush, 687; *Pitts v. Cable*, 44 Ill. 103; *Magnusson v. Johnson*, 73 Ill., 156; *Hall v. Saville*, 3 Greene (Iowa), 37; *West v. Hendrix*, 28 Ala. 226; *Ruffier v. Womack*, 36 Texas, 332; *Hickox v. Lowe*, 10 Cal. 197

² But in order that a conveyance may be treated as a mortgage, there must be a debt or a loan. If there be no debt, the agreement to reconvey is an agreement to repurchase, or converts the original conveyance into a cond-

Among the circumstances, which tend to establish the presumption that the agreement is a defeasance, are the inadequacy of the consideration, the continued possession of the grantor, the necessities or financial embarrassments of the grantor; while the adequacy of the consideration, the possession of the grantee, the vesting of the right to enforce the agreement in a third person, the existence of other securities in the possession of the grantor for the payment of the consideration of the original conveyance, go to prove that it was a conditional sale, or that the grantor has only the right to repurchase.¹

§ 306. **The defeasance clause in equity.**—If the instrument containing the defeasance does not fulfil all the

tional sale. *Conway v. Alexander*, 7 Cranch, 218; *Lund v. Lund*, 1 N. H. 39; *Flagg v. Mann*, 14 Pick, 467; *Reading v. Weston*, 7 Conn. 143; *Galt v. Jackson*, 9 Ga. 151; *Pearson v. Seay*, 35 Ala. 612; *Henley v. Hotaling*, 41 Cal. 22; *De France v. De France*, 34 Pa. St. 385; *Rich v. Doane*, 35 Vt. 125.

¹ *Williams v. Owen*, 5 Mylne & C. 303; *Perry v. Meddowcraft*, 4 Beav. 197; *Haines v. Thompson*, 70 Pa. St. 442; *Hiester v. Madeira*, 3 Watts & S. 384; *Baker v. Thrasher*, 4 Denio, 493; *Slowey v. McMurray*, 31 Mo. 113; *Conway v. Alexander*, 7 Cranch, 218; *Holmes v. Grant*, 8 Paige Ch. 243; *Russell v. Southard*, 12 How. 139; *Waters v. Randall*, 6 Metc. 479; *Todd v. Hardie*, 5 Ala. 698; *West v. Hendrix*, 28 Ala. 226; *Lockett v. Townshend*, 3 Texas, 119; *Edington v. Harper*, 3 J. J. Marsh. 353; *Davis v. Stonestreet*, 4 Ind. 101; *Sellers v. Stalcup*, 7 Ired. Eq. 13; *Bennett v. Holt*, 2 Yerg. 6; *Flagg v. Mann*, 14 Pick 467; *Low v. Henry*, 9 Cal. 538; *Warren v. Lovis*, 53 Me. 463; *Ransone v. Frayser*, 10 Leigh, 592; *Gibson v. Eller*, 13 Ind. 124; *Campbell v. Dearborn*, 109 Mass. 130; *Thompson v. Banks*, 2 Md. Ch. 430; *Freeman v. Wilson*, 51 Miss. 329; *Brown v. Dewey*, 1 Sandf. Ch. 56; *Carr v. Rising*, 62 Ill. 14; *Pearson v. Seay*, 35 Ala. 612; *Elliott v. Maxwell*, 7 Ired. Eq. 246; *Trucks v. Lindsey*, 18 Iowa, 504; *Gibbs v. Penny*, 43 Texas, 560; *Crews v. Threadgill*, 35 Ala. 334; *Wilson v. Patrick*, 34 Iowa, 361; *Daubenspeck v. Platt*, 22 Cal. 330. When it is doubtful on all the facts of the case, whether the transaction is a mortgage or a conditional sale, it is always presumed to be a mortgage. *Russell v. Southard*, 12 How. 139; *Eaton v. Green*, 22 Pick. 526; *Crane v. Bonnell*, 1 Green Ch. 264; *Baughner v. Merryman*, 32 Md. 185; *Bacon v. Brown*, 19 Conn. 34; *Turnipseed v. Cunningham*, 16 Ala. 501; *Cottrell v. Long*, 20 Ohio, 464; *Gillis v. Martin*, 2 Dev. Eq. 470; *O'Neil v. Capelle*, 62 Mo. 209; *Turner v. Kerr*, 44 Mo. 429; *Heath v. Williams*, 30 Ind. 498; *Scott v. Henry*, 13 Ark. 112; *Swetland v. Swetland*, 3 Mich. 645; *Trucks v. Lindsay*, 18 Iowa, 504; *Ward v. Deering*, 4 Mon. 44.

legal requirements of a deed, it will not in a court of law have the effect of converting an absolute conveyance into a mortgage. But it will be good in equity, and in that court the conveyance will be treated and enforced as a mortgage against all having actual notice of its real character. Thus, the want of a seal, the absence of the requisite number of witnesses, an improper acknowledgment of the deed, would invalidate the defeasance in law, but it would be enforced in equity.¹ Courts of equity have not only gone thus far in correcting and supplementing the common law, but they have also, in cases where the defeasance was not put to writing, sustained

§ 307. **The admissibility of parol evidence,**—To prove that a deed, absolute on its face, was intended to be a mortgage. The authorities are not uniform as to how far, or in what cases, such evidence is admissible. Some have held that in any case parol evidence can be introduced to prove a deed to be a mortgage, thus ignoring completely the application of the Statute of Frauds to mortgages,² while others

¹ Story Eq. Jur., sect. 1018; *Kelleran v. Brown*, 4 Mass. 444; *Eaton v. Green*, 22 Pick. 526; *Delaire v. Keenan*, 3 Desau. 74; *Woods v. Wallace*, 22 Pa. St., 171; *Flagg v. Mann*, 14 Pick. 467; *Cutter v. Dickinson*, 8 Pick. 386; *Jewett v. Bailey*, 5 Me. 87; *Warren v. Louis*, 53 Me. 463; *Murphy v. Calley*, 1 Allen, 107; *Gillis v. Martin*, 2 Dev. Eq. 470.

² *Russell v. Southard*, 12 How. 139; *Babcock v. Wyman*, 19 How. 239; *Sprigg v. Bk. of Mt. Pleasant*, 14 Pet. 201; *Jordan v. Fenno*, 13 Ark. 593; *Anthony v. Anthony*, 23 Ark. 479; *Pierce v. Robinson*, 13 Cal. 116; *Farmer v. Grose*, 42 Cal. 169; *Kuhn v. Rumpff*, 46 Cal. 299; *Klock v. Walter*, 70 Ill. 416; *Wynkoop v. Cowing*, 21 Ill. 570; *Sutphen v. Cushman*, 35 Ill. 186; *Conwell v. Evill*, 4 Ind. 67; *Heath v. Williams*, 30 Ind. 495; *Roberts v. McMahan*, 4 Greene (Iowa), 34; *Johnson v. Smith*, 39 Iowa 549; *Zuver v. Lyons*, 40 Iowa, 570; *Moore v. Wade*, 8 Kan. 381; *Richardson v. Woodbury*, 43 Me. 206; *Whitney v. Batchelder*, 32 Me. 313; *Campbell v. Dearborn*, 109 Mass. 130; 12 Am. Rep. 671; *Hassam v. Barrett*, 115 Mass. 24; *McDonough v. Squire*, 111 Mass. 256; *Flagg v. Mann*, 14 Pick. 467, 478; *Glass v. Hulbert*, 102 Mass. 24; *Emerson v. Atwater*, 7 Mich. 12; *Swetland v. Swetland*, 3 Mich. 482; *Wadsworth v. Loranger*, Har. (Mich.) 113; *Belate v. Morrison*, 8 Minn. 87; *Weide v. Gehl*, 21 Minn.

either deny the right altogether,¹ or limit its admissibility to such cases as fall within the ordinary equitable jurisdiction of fraud, accident or mistake, *i.e.*, where the failure to reduce the defeasance to writing arose through some fraud, accident or mistake.² As a general rule, such evidence will be received only in a court of equity, and although perhaps the majority of the courts apply the rule to every case, irrespective of any question of fraud, yet, upon a closer analysis of the cases, it will be found that in no case

449; *Freeman v. Wilson*, 51 Miss. 329; *Littlewort v. Davis*, 50 Miss. 403; *O'Neill v. Capelle*, 62 Mo. 202; *Hogel v. Lindell*, 10 Mo. 483; *Slowey v. McMurray*, 27 Mo. 116; *Schade v. Bessenger*, 3 Neb. 140; *Cookes v. Culbertson*, 9 Nev. 199; *Sweet v. Parker*, 22 N. J. Eq. 453; *Crane v. Bonnell*, 1 Green Ch. 264; *Strong v. Stewart*, 4 Johns. 167; *Horn v. Keteltas*, 46 N. Y. 605; *Carr v. Carr*, 52 N. Y. 258; *Fielder v. Darien*, 50 N. Y. 437; *Murray v. Walker*, 31 N. Y. 399; *Miami Ex. Co. v. U. S. Bank*, *Wright*, 249; *Cottrell v. Long*, 20 Ohio, 464; *Kerr v. Gilmore*, 6 Watts, 405; *Rhines v. Baird*, 41 Pa. St. 256; *Palmer v. Guthrie*, 76 Pa. St. 441; *Taylor v. Luther*, 2 Sumn. 228; *Nichols v. Reynolds*, 1 R. I. 30; *Nichols v. Cabe*, 3 Head. 93; *Haynes v. Swann*, 6 Heisk. 560; *Ruggles v. Williams*, 1 Head, 141; *Mead v. Randolph*, 8 Texas, 191; *Carter v. Carter*, 5 Texas, 93; *Gibbs v. Penny*, 43 Texas, 560; *Wright v. Bates*, 13 Vt. 348; *Hills v. Loomis*, 42 Vt. 562; *Ross v. Norvell*, 1 Wash. (Va.) 14; *Bird v. Wilkinson*, 4 Leigh, 263; *Klinek v. Price*, 4 W. Va. 4; 6 Am. Rep. 268; *Rogan v. Walker*, 1 Wis. 527; *Wileox v. Bates*, 26 Wis. 465.

¹ *Bassett v. Bassett*, 10 N. H. 64; *Porter v. Nelson*, 4 N. H. 130; *Boody v. Davis*, 20 N. H. 140. By statute, in Georgia, the admissibility of parol evidence is limited to cases of fraud in the procurement of the absolute deed. Code Ga. (1873), p. 669; *Spence v. Steadman*, 49 Ga. 133; *Broach v. Barfield*, 57 Ga. 601. In Connecticut, it has been lately held to be a doubtful question. *Osgood v. Thompson Bk.*, 30 Conn. 27.

Washburn v. Merrills, 1 Day, 139; *Collins v. Tillon*, 26 Conn. 368; *Brainerd v. Brainerd*, 15 Conn. 575; *French v. Burns*, 35 Conn. 359; *Chaires v. Brady*, 19 Fla. 133; *Spence v. Steadman*, 49 Ga. 133; *Biggars v. Bird*, 55 Ga. 650; *Skinner v. Miller*, 5 Litt. 86; *Blanchard v. Kenton*, 4 Bibb., 451. And if the deed is made absolute so as to cover up a usurious contract, it will be such a ground of fraud in Kentucky as will admit parol evidence. *Murphy v. Trigg*, 1 Mon. 72; *Cook v. Colyer*, 2 B. Mon. 71; *Bk. of Westminster v. Whyte*, 1 Md. Ch. 536; *s. c.* 3 *Id.* 508; *Artz v. Grove*, 21 Md. 474; *Price v. Grover*, 40 Md. 102; *Kelly v. Bryan*, 6 Ired. Eq. 283; *Brothers v. Harrill*, 2 Jones Eq. 209; *Glisson v. Hill*, *Id.* 256; *Arnold v. Mattison*, 3 Rich. Eq. 153.

does the court of equity interfere and permit the introduction of parol evidence, unless the circumstances of the case are such as would make the vendee guilty of at least constructive fraud in insisting upon the deed being treated as an absolute conveyance.¹

§ 308. **Contemporaneous Agreements.**—If the deed be in fact a mortgage, not only will no parol evidence be admitted to show that such was not the intention of the parties, but it is also impossible by any contemporaneous agreement of the most formal character to withdraw from the mortgage the rights which are incident thereto, or to change the obligations of the parties thereunder in any manner whatsoever. The right to redeem after condition broken can never be taken away by such an agreement. The agreement is simply void.² Neither can the mortgage provide

¹ In most of the States where the rule is broad as above stated, it is held, to employ the language of Mr. Jones, that "fraud in the use of the deed is as much a ground for the interposition of equity as fraud in its creation." Jones on Mortg. sect. 288; *Pierce v. Robinson*, 13 Cal. 116; *Conwall v. Evill*, 4 Ind. 67; *O'Neill v. Capelle*, 62 Mo. 202; *Moreland v. Bernhart*, 44 Texas, 275, 283; *Wright v. Bates*, 13 Vt. 348; *Rogan v. Walker*, 1 Wis. 52; *Strong v. Stewart*, 4 Johns. Ch. 167. See generally the cases cited *supra*. Under this theory, the extreme doctrine, that parol evidence is admissible to show an absolute deed to be a mortgage, does not conflict with the ordinary construction of the Statute of Frauds.

² *Wing v. Cooper*, 37 Vt. 181; *Clark v. Henry*, 2 Cow. 324; *Henry v. Davis*, 7 Johns. Ch. 40; *Waters v. Randall*, 6 Metc. 479; *Bailey v. Bailey*, 5 Gray, 505; *Vanderhaize v. Haques*, 13 N. J. 244; *Oldenbaugh v. Bradford*, 67 Pa. St. 104; *Rankin v. Mortimere*, 7 Watts, 372; *Baxter v. Child*, 39 Me. 110; *Johnston v. Gray*, 16 Serg. & R. 361; *Murphy v. Calley*, 1 Allen, 107; *Clark v. Condit*, 18 N. J. Eq. 358; *Batty v. Snook*, 5 Mich. 231; *Thompson v. Davenport*, 1 Wash. (Va.) 125; *Eaton v. Whiting*, 3 Pick. 484; *Davis v. Stonestreet*, 4 Ind. 101; *Wynkoop v. Cowing*, 21 Ill. 570; *Robinson v. Farrelly*, 16 Ala. 472; *Cherry v. Bowen*, 4 Sneed, 415; *Lee v. Evans*, 8 Cal. 424; *Pierce v. Robinson*, 13 Cal. 125; *Rogan v. Walker*, 1 Wis. 527; *Plato v. Roe*, 14 Wis. 453; *Willetts v. Burgess*, 34 Ill. 494; *Seton v. Slade*, 7 Ves. 265; *Newcomb v. Bonham*, 1 Vern. 7; *Co. Lit.* 205 a, n. 96; 1 *Spence Eq. Jur.* 693; *Miami Ex. Co. v. U. S. Bank*, *Wright* (Ohio), 253; *Youle v. Richards*, 1 N. J. Eq. 534; *McClurkan v. Thompson*, 69 Pa. St. 305.

for redemption within a shorter period than what is allowed by law, nor impose an increased rate of interest after breach of the condition, nor require anything else which would in the slightest degree curtail the right to redeem.¹

309. Subsequent Agreements. — But it is possible for the mortgagor by a subsequent agreement, either to deprive himself entirely of the equity of redemption, or to limit its exercise. But in view of the peculiar relation of the parties, and the possibility of duress and undue influence through the perhaps impecunious condition of the mortgagor, courts of equity look with suspicion upon all such agreements; and if there is any improper advantage taken of his financial embarrassment, or the transaction is in the slightest degree a hard bargain, the agreement will be annulled, and the mortgagor permitted to redeem. For that reason the purchase by the mortgagee of the mortgagor's equity of redemption must be conducted with the most scrupulous care, in order to remove from the transaction all suspicion of fraud.²

¹ *Johnston v. Gray*, 16 Serg. & R. 361; *Howard v. Harris*, 1 Vern. 33; *Spurgeon v. Collier*, 1 Eden, 55; *Willett v. Winnell*, 1 Vern. 488; *Mayo v. Judah*, 5 Munf. 495; *Price v. Perrie*, Freem. Ch. 257; *Sheckell v. Hopkins*, 2 Md. Ch. 89; *Hallifax v. Higgins*, 2 Vern. 134; *McGready v. McGready*, 17 Mo. 597; *McClurkan v. Thompson*, 69 Pa. St. 305; *Toomes v. Couset*, 3 Atk. 261; *Waters v. Randall*, 6 Metc. 479; *Chambers v. Goldwin*, 9 Ves. 271; *Jennings v. Ward*, 2 Vern. 520; *Chambers v. Goldwin*, 9 Ves. 71; *Leith v. Irvine*, 1 My. & K. 277; *Blackburn v. Warwick*, 2 Younge & C. 92. But it has been held that the right to redeem may be postponed for a reasonable time by the agreement of the parties. *Talbot v. Braddill*, 1 Vern. 183; *Cowdry v. Day*, 1 Gif. 316. And an agreement that, upon the failure to pay interest or an instalment of the principal when due, the entire debt will fall due, is good, and does not curtail the right to redeem. *Ferris v. Ferris*, 28 Barb. 29; *People v. Supreme Court*, 19 Wend. 104; *Noyes v. Clark*, 7 Paige, 179; *James v. Thomas*, 5 B. & Ad. 40; *Basse v. Gallagher*, 7 Wis. 442; *Ottawa Plank Road v. Murray*, 15 Ill. 336. *Contra*, *Tiernan v. Hinman*, 16 Ill. 400.

² *Russell v. Southard*, 12 How. (U. S.) 139; *Trull v. Skinner*, 17 Pick. 213; *Falis v. Conway Ins. Co.*, 7 Allen, 49; *Harrison v. Trustees*, 12 Mass. 456; *Rice v. Bird*, 4 Pick. 350; *Patterson v. Yeaton*, 47 Me. 308; *Villa v. Rodri-*

§ 310. **The mortgage debt.** — There can be no mortgage without a mortgage debt. The debt may be either antecedent or contemporary, or it may be incurred in the future, the last being known as future advances. All that is required is that the debt is sufficiently described and limited in the mortgage, so that it may be recognized and distinguished from other obligations.¹ The debt creates a per-

guez, 12 Wall. 323; *Lawrence v. Stratton*, 6 Cush. 163; *Hyndman v. Hyndman*, 19 Vt. 9; *Holdridge v. Gillespie*, 2 Johns. Ch. 30; *Mason v. Grant*, 21 Me. 160; *Maxfield v. Patchen*, 29 Ill. 42; *Carpenter v. Carpenter*, 70 Ill. 457; *Sheckell v. Hopkins*, 2 Md. Ch. 89; *Marshall v. Stewart*, 17 Ohio, 356; *Wynkoop v. Cowing*, 21 Ill. 570; *Baughner v. Merryman*, 32 Md. 185; *Locke v. Palmer*, 26 Ala. 312; *Shubert v. Stanley*, 52 Ind. 46; *Waters v. Randall*, 6 Metc. 479; *Vennum v. Babcock*, 13 Iowa, 194; *Green v. Butler*, 26 Cal. 602; *Henry v. Davis*, 7 Johns. Ch. 40; *Mills v. Mills*, 26 Conn. 213; *Wright v. Bates*, 13 Vt. 341.

¹ *Robertson v. Stark*, 15 N. H. 112; *Williams v. Hilton*, 35 Me. 547; *Partridge v. Swazey*, 46 Me. 414; *Hough v. Bailey*, 32 Conn. 288; *Frink v. Branch*, 16 Conn. 260; *Johns v. Church*, 12 Pick. 557; *Boody v. Davis*, 20 N. H. 140; *Warner v. Brooks*, 14 Gray, 107; *McKinster v. Babcock*, 20 N. Y. 375; *Kellogg v. Frazier*, 40 Iowa, 502; *Paine v. Benton*, 32 Wis. 491; *Boyd v. Baker*, 43 Md. 182; *Hurd v. Robinson*, 11 Ohio St. 232; *Hughes v. Edwards*, 9 Wheat. 489; *Kimball v. Myers*, 21 Mich. 276; *Aull v. Lee*, 61 Mo. 160; *Follett v. Heath*, 15 Wis. 601; *McDaniels v. Calvin*, 16 Vt. 300; *Booth v. Barnum*, 9 Conn. 286; *Gilman v. Moody*, 43 N. H. 329; *Ricketson v. Richardson*, 16 Cal. 330; *Sheafe v. Gerry*, 18 N. H. 245; *Moore v. Fuller*, 6 Oreg. 272; 25 Am. Rep. 524. And where the description is not sufficiently particular to make the identification of the debt sure, parol evidence is admissible to connect the debt with the mortgage, and supply the deficiencies of the description. *Jackson v. Bowen*, 7 Cow. 13; *Johns v. Church*, 12 Pick. 557; *Hall v. Tufts*, 18 Pick. 455; *Bell v. Fleming*, 1 Beasl. 13; *Baxter v. McIntire*, 13 Gray, 166; *Gill v. Pinney*, 12 Ohio St. 38; *Doe v. McLoskey*, 1 Ala. 708; *Babcock v. Lisk*, 57 Ill. 327; *Aull v. Lee*, 61 Mo. 160; *N. H. Bk. v. Willard*, 10 N. H. 210; *Hurd v. Robinson*, 11 Ohio St. 232; *Crafts v. Crafts*, 13 Gray, 168. It has been held that it is not necessary that the amount of the debt be stated in the mortgage, whether the sum be certain or uncertain. *Pike v. Collins*, 33 Me. 38; *Somersworth Sav. Bk v. Roberts*, 38 N. H. 22. *Contra*, *Hart v. Chalker*, 14 Conn. 77; *Pearce v. Hall*, 12 Bush, 209, which hold that where the debt is a certain fixed sum, the amount should be stated. But although the amount need not perhaps be stated in the mortgage, means must be provided in it, by way of reference to other papers or records, for ascertaining the amount. Thus mortgages have been held good, where they intended to secure a general indebtedness, such as, "what I may owe on book," "all the notes or agreements

sonal obligation, which runs parallel with, but is independent of, the mortgage. The former obligation depends upon the privity of contract, and binds only the mortgagor and his personal representatives. The latter is an obligation *in rem*, resting upon the privity of estate in the mortgaged land, and binds the land in whosoever hands it may come. But for the support of the mortgage, the personal obligation need not exist; that is, the debt need not, independently of the mortgage, be enforceable at law. Thus a mortgage by husband and wife of the wife's lands, to secure the note of the wife, would be good, even though the wife's contracts are held to be otherwise absolutely void.¹ So also

I now owe," "all sums that the mortgagee may become liable to pay," an open book account, and the like. *Merrills v. Swift*, 18 Conn. 257; *Shirras v. Caig*, 7 Cranch, 34; *Lewis v. De Forrest*, 20 Conn. 427; *Seymour v. Darrow*, 31 Vt. 142; *Vanmeter v. Vanmeter*, 3 Gratt. 148; *Fisher v. Otis*, 3 Chand. 83; *Machette v. Wanless*, 1 Col. 225; *Booth v. Barnum*, 9 Conn. 286; *DeMott v. Benson*, 4 Edw. Ch. 297; *U. S. v. Sturges*, 1 Paine, 525; *Mix v. Cowles*, 20 Conn. 420; *Esterly v. Purdy*, 50 How. Pr. 350; *Emery v. Owings*, 7 Gill, 488; *Mich. Ins. Co. v. Brown*, 11 Mich. 265. But a debt must, to at least a reasonable degree, conform to the particulars of the description, in order to be covered by the mortgage. *Doyle v. White*, 26 Me. 341; *Storms v. Storms*, 3 Bush, 77; *Walker v. Paine*, 31 Barb. 213; *Follett v. Heath*, 15 Wis. 601; *Hall v. Tufts*, 18 Pick. 455; *Babcock v. Lisk*, 57 Ill. 327. But see *Baxter v. McIntire*, 13 Gray, 168. In Maryland and New Hampshire, there are statutes requiring the amount of the debt intended to be secured to be stated in the mortgage. Pub. Lien Laws (Md.), 1860, art. 64, sect. 2; Gen. Stats. N. H. 253; and where the mortgage is for future advances, the amount must be limited. *Wilson v. Russell*, 13 Md. 494; *Leeds v. Cameron*, 3 Sumn. 488; *Bank v. Willard*, 10 N. H. 210. Generally the amount of the advances need not be stated, provided it can be otherwise ascertained by the description. *Allen v. Lathrop*, 46 Ga. 133; *Crane v. Deming*, 7 Conn. 387; *U. S. v. Hooe*, 3 Cranch, 73; *Shirras v. Caig*, 7 Cranch, 34, *Hubbard v. Savage*, 8 Conn. 215; *Faye v. Bank of Ill.*, 11 Ill. 357; *Hughes v. Worley*, 1 Bibb, 200, and other cases cited *supra*.

¹ *Brookings v. White*, 49 Me. 479; *Crooker v. Holmes*, 55 Me. 195; 20 Am. Rep. 687; *Wyman v. Brown*, 50 Me. 150; *Beals v. Cobb*, 51 Me. 348; *Ellis Kinyon*, 25 Ind. 136; *Van Cott v. Heath*, 9 Wis. 516; *Hubble v. Wright*, 23 Ind. 322; *Hoffey v. Carey*, 73 Pa. St. 433; *Neimcewitz v. Sohn*, 3 Paige, 643; *Story's Eq. Jur.*, sect. 1399; *Brigham v. Potter*, 14 Gray, 522; *Taylor v. Page*, 6 Allen, 86; *Bucklin v. Bucklin*, 1 Abb. Pr. 242; see *contra*, *Heburn v. Warner*, 112 Mass. 271; 17 Am. Rep. 86.

is the mortgage good if the Statute of Limitations has run against the debt. And it may be stated generally, that the personal liability of the mortgagor for the mortgage debt is not essential to the validity of the mortgage, although its absence may constitute a circumstance from which it might be inferred that the transaction was intended to be a conditional sale, instead of a mortgage.¹ It is usual for the debt to be contained in a separate writing as a bond or note; but that is not necessary since the acknowledgment of the debt in the mortgage will be a sufficient compliance with the provisions of the Statute of Frauds. Nor is it necessary that the recital of the debt in the mortgage should correspond in every respect with the instrument of indebtedness. Any

¹ *Flagg v. Mann*, 2 Sumn. 534; *Rich v. Doane*, 35 Vt. 129; *Haines v. Thompson*, 70 Pa. St. 442; *Ball v. Wyeth*, 8 Allen, 278; *Flint v. Sheldon*, 13 Mass. 443; *Glover v. Payn*, 19 Wend. 518; *Holmes v. Grant*, 8 Paige Ch. 243; *Mills v. Darling*, 43 Me. 565; *Murphy v. Calley*, 1 Allen, 108; *Swetland v. Swetland*, 3 Mich. 482; *Dougherty v. McColgan*, 6 Gill & J. 285; *Van Brunt v. Mismar*, 8 Minn. 232; *Ferris v. Crawford*, 2 Denio, 595; *Weed v. Coville*, 14 Barb. 242; *Hickox v. Lowe*, 10 Cal. 197; *Brant v. Robertson*, 16 Mo. 129; *Salisbury v. Philips*, 10 Johns. 57; *Elder v. Rouse*, 15 Wend. 218; *Conway v. Alexander*, 7 Cranch, 218; *Stephens v. Sherrod*, 6 Texas, 294; *Bank of Mt. Pleasant v. Sprigg*, 1 McLean, 178; *Bacon v. Brown*, 17 Conn. 29; *Scott v. Fields*, 7 Watts, 360; *Hill v. Eliot*, 12 Mass. 26; *Miami Ex. Co. v. U. S. Bank*, *Wright (Ohio)*, 252; *Drummond v. Richards*, 2 Munf. 337; *Floyer v. Lavington*, 1 P. Wms. 268; *King v. King*, 3 P. Wms. 358; *Mitchell v. Burnham*, 44 Me. 286. Where there is no separate obligation to pay the debt, in order that there may be a personal liability upon the mortgagor, the mortgage must contain a covenant for payment, or at least an acknowledgment of the existence of the debt. *Brown v. Cascaden*, 43 Iowa, 103; *Elder v. Rouse*, 15 Wend. 218; *Yates v. Aston*, 4 Q. B. 182; *Goodwin v. Gilbert*, 9 Mass. 510. That the mortgage may be enforced, even after the debt has been barred by the Statute of Limitations, see *Thayer v. Mann*, 19 Pick. 537; *Hughes v. Edwards*, 9 Wheat. 489; *Elkins v. Edwards*, 8 Ga. 326; *Wood v. Augustine*, 61 Mo. 46; *Richman v. Aiken*, 25 Vt. 324; *Kellar v. Sinton*, 14 B. Mon. 307; *Hough v. Bailey*, 32 Conn. 288; *Birnie v. Main*, 29 Ark. 591; *Knox v. Galligan*, 21 Wis. 470; *Fisher v. Mossman*, 11 Ohio St. 42; *Nevitt v. Bacon*, 32 Miss. 212; *Waltermire v. Westover*, 14 N. Y. 20; *Heyer v. Pruyn*, 7 Paige, 465; *Crooker v. Holmes*, 65 Me. 195; *contra*, *Lord v. Morris*, 18 Cal. 482; *Duty v. Graham*, 12 Texas, 427; *Gower v. Winchester*, 33 Iowa, 303; *Chick v. Willetts*, 2 Kan. 384; *Hagan v. Parsons*, 67 Ill. 170.

immaterial variation would not affect its validity, and if the variance was material, as where the amount was misstated, the mortgage would be good, at least to the amount stated.¹

§ 311. **Mortgages for the support of the mortgagee.** — There is a class of mortgages which, instead of being given as security for the payment of a debt, are conditioned to provide and secure the support of the mortgagee or some other person. The obligation to support, unless it is imposed upon all claiming under the mortgagor, is a personal one, and will prevent his alienation of the mortgaged premises, or their sale under execution, except by the consent of the mortgagee.² Neither is the mortgagee's interest assignable, for the benefit derived from the mortgage is of a personal nature.³ If the mortgagor fails to perform the condition through his inability to furnish the support, he may redeem the land by the payment of a sum of money,

¹ *Russell v. Southard*, 12 How. (U. S.) 139; *Smith v. People's Bank*, 24 Me. 185; *Mitchell v. Barnham*, 44 Me. 246; *Brookings v. White*, 49 Me. 483; *Brown v. Dewey*, 1 Sandf. Ch. 56; *Jaques v. Weeks*, 7 Watts, 268; *Wharf v. Howell*, 5 Bing. 499; *Rice v. Rice*, 4 Pick. 349; *Hickox v. Lowe*, 10 Cal. 197; *Whitney v. Buckman*, 43 Cal. 536. As to variations, see *Cushman v. Luther*, 53 N. H. 562; *Hough v. Bailey*, 32 Conn. 239; *Kimball v. Myers*, 21 Mich. 276; *Stoddart v. Hart*, 23 N. Y. 556; *Large v. Van Doren*, 14 N. J. Eq. 203; *McGready v. McGready*, 17 Mo. 597; *Chester v. Wheelwright*, 5 Conn. 562, and cases cited *supra*, note preceeding note.

² *Bryant v. Erskine*, 55 Me. 156; *Mitchell v. Burnham*, 57 Me. 322; *Bethlehem v. Annis*, 40 N. H. 34; *Flanders v. Lamphear*, 9 N. H. 201; *Dearborn v. Dearborn*, 9 N. H. 117; *Brown v. Leach*, 35 Me. 41; *Rhodes v. Parker*, 10 N. H. 83; *Eastman v. Batchelder*, 36 N. H. 141; *Marsh v. Austin*, 1 Allen, 235; *Austin v. Austin*, 9 Vt. 420; *Daniels v. Eisenlord*, 10 Mich. 455; *Wales v. Mellen*, 1 Gray, 512; *Soper v. Guernsey*, 71 Pa. St. 224. Until condition is broken, the mortgagor is entitled to possession. *Flanders v. Parker*, 9 N. H. 201; *Soper v. Guernsey*, *supra*; and other cases *supra*. Sometimes the condition is in the alternative, to support the mortgagee or to pay a stipulated sum. In that case, the mortgagor has the right to elect within a reasonable time, and both parties are bound by his election. *Bryant v. Erskine*, *supra*; *Soper v. Guernsey*, *supra*; *Furbish v. Sears*, 2 Cliff. 454.

³ *Bethlehem v. Annis*, 40 N. H. 34; *Bryant v. Erskine*, 55 Me. 153.

which would be equivalent to the support to be rendered.¹ Usually the mortgage specifies the place where the support is to be furnished; but where it is silent on that subject, the law requires that it should be tendered in some place convenient to both mortgagor and mortgagee. But if they are residing in the same locality, or on the same land, the mortgagor cannot insist upon supplying it at his own table, or in his own house.² These mortgages are seldom found in actual practice, and by a reference to the cases cited below it will be observed, that they have obtained a greater prevalence in the New England States than elsewhere.³

§ 312. **What may be mortgaged.**—Any vested interest or estate in lands is capable of being mortgaged. An estate for years or for life can be mortgaged as well as the fee. So also can a vendee in possession under a parol or written contract of sale.⁴ And likewise are the interests of the

¹ *Bryant v. Erskine*, 55 Me. 153; *Austin v. Austin*, 9 Vt. 42; *Bethlehem v. Annis*, 40 N. H. 44; *Wilder v. Whittemore*, 15 Mass. 262; *Fiske v. Fiske*, 20 Pick. 499; *Hoyt v. Bradley*, 27 Me. 242. But it has been held that no such right of redemption exists; that where the condition calls for the support of the mortgagee or some other person, the land cannot be redeemed by the payment of a sum of money. *Soper v. Guernsey*, 71 Pa. St. 219. See also, *Evans v. Norris*, 6 Mich. 369; *Hawkins v. Clermont*, 15 Mich. 513; and it is said to rest in the discretion of the court, whether such relief shall be granted. *Henry v. Tupper*, 29 Vt. 358; *Dunklee v. Adams*, 20 Vt. 415. Upon the breach of the condition, the mortgagee may enter into possession, until the mortgage is redeemed or foreclosed. *Flanders v. Lamphear*, 9 N. H. 201; *Eastman v. Batchelder*, 36 N. H. 141. The mortgage may be foreclosed in the same manner as other mortgages. *Marsh v. Austin*, 1 Allen, 235; *Daniels v. Eisenlord*, 10 Mich. 454.

² *Holmes v. Fisher*, 13 N. H. 9; *Flanders v. Lamphear*, *supra*; *Thayer v. Richards*, 19 Pick. 398; *Pettee v. Case*, 2 Allen, 546; *Hubbard v. Hubbard*, 12 Allen, 586; *Jenkins v. Stetson*, 9 Allen, 128; *Rhoades v. Parker*, 10 N. H. 83; *Fiske v. Fiske*, 20 Pick. 499; *Wilder v. Whittemore*, 15 Mass. 262.

³ See cases cited in notes 1 and 2, *supra*.

⁴ *Lanfair v. Lanfair*, 18 Pick. 304; *Attorney-General v. Parmort*, 5 Paige, 620; *Hogan v. Brainard*, 45 Vt. 294; *Phila., etc., R. R. v. Woelpper*, 64 Pa. St. 371; 3 Am. Rep. 596; *John v. Nut*, 19 Wend. 559; *Wilson v. Wilson*, 32 Barb

mortgagor and mortgagee, in whatever light they may be held, possible subjects of a mortgage. Where the mortgagee conveys the estate by way of a mortgage, his mortgagee takes it subject to the mortgagor's right to redeem; but in such a case notice to the mortgagor of the second mortgage by the mortgagee would require the mortgagor to make payment to the sub-mortgagee, so that he might protect his interests against the mortgagee.¹ And where the mortgagor mortgages his equity of redemption, the second mortgage has all the rights of the first mortgagee, except that he can only satisfy his debt out of the mortgaged property after the prior mortgagee has received payment in full.² The franchise of a railroad corporation can be mortgaged, and the mortgage will cover what ever real property may be acquired by the corporation after the execution of the mortgage, and used in the exercise of the franchise. Whether the rolling stock of a railroad will pass with a mortgage of its franchise depends upon the further question, whether such property is held to be real or personal, in

328; *Neligh v. Mechenor*, 11 N. J. Eq. 539; *Sinclair v. Armitage*, 1 Beasl. 174; *Baker v. Bishop Hill Colony*, 45 Ill. 264; *Bull v. Sykes*, 7 Wis. 449; *Holbrook v. Betton*, 5 Fla. 99; *Mowry v. Wood*, 12 Wis. 413; *Hosmer v. Carter*, 68 Ill. 98; *Van Rensselaer v. Dennison*, 35 N. Y. 393; *Kidd v. Teeple*, 22 Cal. 255; *Hutchins v. King*, 1 Wall. 53; *Miller v. Tipton*, 6 Blackf. 238; *Jarvis v. Dutcher*, 16 Wis. 307; *Whitney v. Buckman*, 13 Cal. 536. But a mere possibility, not coupled with an interest, or a personal right, such as the right of pre-emption, cannot be made the subject of a mortgage. *Skipper v. Stokes*, 42 Ala. 255; *Bayler v. Commonwealth*, 40 Pa. St. 37; *Low v. Pew*, 108 Mass. 347; *Purcell v. Mather*, 35 Ala. 570; *Penn v. Ott*, 12 La. An. 233; *Gilbert v. Penn*, 12 La. An. 235. But land held by right of pre-emption may be mortgaged. *Whitney v. Buckman*, 13 Cal. 536.

¹ *Henry v. Davis*, 7 Johns. Ch. 40; *Johnson v. Blydenburgh*, 31 N. Y. 432; *Graydon v. Church*, 7 Mich. 36; *Cutts v. York Mfg. Co.*, 18 Me. 190; *Power v. Lester*, 23 N. Y. 527; *Murdock v. Chapman*, 9 Gray, 156; *Coffin v. Loring*, 9 Allen, 154; *Slee v. Manhattan Co.*, 1 Paige, 48; *Hoyt v. Martense*, 16 N. Y. 231; *Solomon v. Wilson*, 1 Whart. 241; *Brown v. Tyler*, 8 Gray, 135.

² This rule is so general and so well recognized, that no special authority need be cited in support of it. See *post*, sects. 318, 334, 338, 339.

regard to which the courts have rendered contrary decisions. If the rolling stock is considered to be realty, it will pass with the mortgage, otherwise it will not.¹

¹ *Pierce v. Emery*, 32 N. H. 484; *Hoyle v. Plattsburg, etc., R. R.*, 54 N. Y. 314; *Willink v. Morris Canal*, 3 Green Ch. 377; *Galveston R. R. v. Cowdrey*, 11 Wall. 481; *Dunham v. Railway Co.*, 1 Wall. 254; *Rennoek v. Coe*, 23 How. (U. S.) 117; *Benjamin v. Elmira, etc., R. R. Co.*, 54 N. Y. 675; *Howe v. Freeman*, 14 Gray, 566; *Morrill v. Noyes*, 56 Me. 458; *Emerson v. European, etc. R. R.*, 67 Me. 387; 24 Am. Rep. 39; *Pierce v. Mil. R. Co.*, 24 Wis. 551; 1 Am. Rep. 203; *Coopers v. Wolf*, 15 Ohio St. 523; *Sillers v. Lester*, 48 Miss. 513; *Phillips v. Winslow*, 18 B. Mon. 431; *Coe v. McBrown*, 22 Ind. 252; *Rowan v. Sharp's Rifle Co.*, 29 Conn. 282; *Phila., etc., R. R. v. Woelpper*, 64 Pa. St. 366; 3 Am. Rep. 596; *Chew v. Barret*, 11 Serg. & R. 389; *Parkhurst v. Northern, etc., R. Co.*, 19 Md. 472. But only so much of the franchise will pass to the mortgagee, as is necessary to make the grant beneficial to him. *Eldridge v. Smith*, 34 Vt. 484. As to whether rolling-stock is real or personal property, see *ante*, sect. 2.

SECTION II.

THE RIGHTS AND LIABILITIES OF MORTGAGORS AND MORTGAGEES.

- SECTION 318. The mortgagor's interest.
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339. Rule of priority from registry, its force and effect.
340. Registry of assignments of mortgages and equities of redemption.
341. Tacking of mortgages.
342. Priority in mortgages for future advances.

§ 318. *The mortgagor's interest.* — Whatever may be the view taken in any particular State of the character of a mortgage, whether it is construed as a conveyance of an estate in lands, or only the grant of a lien, the mortgagor's interest *before condition broken* is a legal estate, the only difference being, that under the common-law theory of the mortgage, it is an estate in reversion, or more strictly a possibility of reverter, while under the lien theory it is a present vested estate, only liable to be

destroyed by the enforcement of the lien. It is subject to the same rules of conveyance and descends to the heirs as any other kind of real estate.¹ And it may be stated as a general proposition that, except as against the mortgagee, he is clothed with all the rights and liabilities which are usually incident to an estate in lands.² Upon the breach of the condition, under the common-law theory that the mortgage conveyed a defeasible estate, the estate became absolute in the mortgagee, leaving nothing in the mortgagor but the equitable right to redeem the estate. This was called the *equity of redemption*. It was no estate in the land, simply an equitable right to regain the legal estate. At

¹ Co. Lit. 205 a, Butler's note, 96; Thorne v. Thorne, 1 Vern. 141; Casborne v. Scarfe, 1 Atk. 606; Ledyard v. Butler, 9 Paige Ch. 132; Chamberlain v. Thompson, 10 Conn. 243; Baxter v. Dyer, 5 Ves. 656; McTaggart v. Thompson, 14 Pa. St. 149; Wilkins v. French, 20 Me. 111; White v. Whitney, 3 Mete. 81; Huckins v. Straw, 34 Me. 166; Bird v. Decker, 64 Me. 550; Orr v. Hadley, 36 N. H. 575; Kennett v. Plummer, 28 Mo. 142; White v. Rittenmyer, 30 Iowa, 272; Wright v. Rose, 2 Sim. & S. 323; Glass v. Ellison, 9 N. H. 69; Bourne v. Bourne, 2 Hare, 35; Bigelow v. Wilson, 1 Pick. 485.

² Willington v. Gale, 7 Mass. 138; Taylor v. Porter, 7 Mass. 355; Blaney v. Pearce, 2 Greenl. 132; Wilkins v. French, 20 Me. 111; Felch v. Taylor, 13 Pick. 133; Savage v. Dooley, 28 Conn. 411; Bird v. Decker, 64 Me. 550; Collins v. Torry, 7 Johns. 278; Orr v. Hadley, 30 N. H. 578; Schuykill Co. v. Thoburn, 7 Serg. & R. 411; Hitchcock v. Harrington, 6 Johns. 290; Assay v. Hoover, 5 Pa. St. 21; Clark v. Reyburn, 1 Kan. 281. Except as against the mortgagee and his privies, the mortgagor may maintain actions to recover possession or to recover damages for waste. Huckins v. Straw, 34 Me. 166; Stinson v. Ross, 51 Me. 556; Ellison v. Daniels, 11 N. H. 274; Den v. Dimon, 5 Halst. 156; Doe v. McLoskey, 1 Ala. 708; Brown v. Snell, 6 Fla. 745; Ballard v. Ballardvale Co., 5 Gray, 468; Bird v. Decker, 64 Me. 550; Hall v. Lance, 25 Ill. 277; Glass v. Ellison, 9 N. H. 69; Woods v. Hildebrand, 46 Mo. 234; 2 Am. Rep. 513. In Meyer v. Campbell, 12 Mo. 603, it was held that ejectment will not lie by the mortgagor after the breach of the condition. And where the mortgagee has taken possession, an action for waste cannot be maintained by the mortgagor, unless the inheritance has been injured by the trespass. Sparhawk v. Bagg, 16 Gray, 583. The mortgagor's widow has dower in the equity, if she has released her dower in the land, and may redeem the land from the mortgagee. Titus v. Neilson, 5 Johns. Ch. 452; Van Duyne v. Thayre, 14 Wend. 233; Hawley v. Bradford, 9 Paige Ch. 200; Snow v. Stevens, 15 Mass. 278; Eaton v. Simonds, 14 Pick. 98; McCabe v. Bellows, 7 Gray, 148; see *post*, sect. 334.

common law, therefore, the interest of the mortgagor after condition broken, although still considered real estate and descendible to the heirs of the mortgagor, and capable of alienation by the usual methods, could not be levied upon by creditors. But in this country at the present day the equity of redemption is generally held to have all the characteristics and qualities of a legal estate, and this too in those States whose courts still cling to the common-law theory of mortgages. The equity is now generally subject to levy and sale under execution.¹

¹ It is liable for debts. *Cushing v. Hurd*, 4 Pick. 253; *Febeiger v. Craighead*, 4 Dall. 151; *Perrin v. Read*, 35 Vt. 2; *Dunbar v. Starkey*, 19 N. H. 160; *Dadmun v. Lamson*, 9 Allen, 85; *Smith v. Sweetser*, 32 Me. 246; *Clinton Nat. Bank v. Manwaring*, 39 Iowa, 281; *Fox v. Harding*, 21 Me. 104; *White v. Whitney*, 3 Metc. 81; *Curtis v. Root*, 20 Ill. 53; *Grace v. Mercer*, 10 B. Mon. 157; *Crow v. Tinsley*, 16 Dana, 402; *Waters v. Stewart*, 1 Caines' Cas. 47; *Cotten v. Blocker*, 6 Fla. 1; *Fernald v. Linscott*, 6 Greenl. 234; *Huntington v. Cotton*, 31 Miss. 253; *Wiggin v. Heyward*, 118 Mass. 514; *Hall v. Tunnell*, 1 Houst. 320; *Van Ness v. Hyatt*, 13 Pet. 294; *Penderson v. Brown*, 1 Day, 93; *Slate v. Laval*, 4 McCord, 336; *Jackson v. Willard*, 4 Johns. 41. At common law, it was not subject to levy and sale under execution, although perhaps always liable in equity. *Plunkett v. Penson*, 2 Atk. 290; *Forth v. Norfolk*, 4 Madd. 504; *Van Ness v. Hyatt*, 13 Pet. 294; *Hill v. Smith*, 2 McLean, 446. But in most of the States the courts have either by their adjudications assumed that it was a common-law right, or the right has been expressly given by statute. Statutes have been passed in Alabama, Connecticut, Florida, Illinois, Massachusetts, Mississippi, Maine, North Carolina, South Carolina, and several other States. 2 Washb. on Real Prop. 163. But the mortgagee cannot reduce the mortgage-debt to judgment, and levy upon the equity of redemption. *Lyster v. Dolland*, 1 Ves. 431; *Washburn v. Goodwin*, 17 Pick. 137; *Atkins v. Sawyer*, 1 Pick. 351; *Palmer v. Foote*, 7 Paige Ch. 437; 2 N. Y. Rev. Stat. 368; *Goring v. Shreve*, 7 Dana, 67; *Deaver v. Parker*, 2 Ired. Eq. 40; *Camp v. Coxe*, 1 Dev. & B. 52; *Tice v. Annin*, 2 Johns. Ch. 125; *Powell v. Williams*, 14 Ala. 476; *Barker v. Bell*, 37 Ala. 358; *Duck v. Sherman*, 2 Dougl. (Mich.) 176; *Thornton v. Pigg*, 24 Mo. 249; *Baldwin v. Jenkins*, 23 Miss. 206; *Waller v. Tate*, 4 B. Mon. 529; *Hill v. Smith*, 2 McLean, 446; *contra*, *Porter v. King*, 1 Me. 297; *Trimm v. Marsh*, 58 N. Y. 599; 13 Am. Rep. 623; *Crooker v. Frazier*, 52 Me. 406; *Freeby v. Tupper*, 15 Ohio, 467; *Pierce v. Potter*, 7 Watts, 475. But if the mortgage-debt has been assigned to a *bona fide* holder, without the mortgage, such assignee may levy upon the equity of redemption. *Crane v. March*, 4 Pick. 131; *Andrews v. Fisk*, 101 Mass. 424; *Waller v. Tate*, 4 B. Mon. 529. And it has also been held that the first mort-

§ 319. **The mortgagee's interest.** — Under the common-law theory, the mortgagee has the freehold estate both before and after the breach of the condition. Before, it is a defeasible estate, and after, an absolute estate. His interest, therefore, was a legal estate, it descended to his heirs, and required the same formalities of conveyance.¹ But under the lien theory he is said to have only a chattel interest until foreclosure. The mortgage is not real estate, it is personal property, which descends with the debt to the personal representatives. And now the equity rule substantially prevails, whether the mortgagee's interest is considered real estate or personal property, and after his death the mortgagee's personal representatives exercise all his rights under the mortgage, a release or conveyance by the heir having no effect upon the rights of the personal representatives. The heir takes the mortgage as trustee for the personal representatives.²

§ 320. **Devise of the mortgage.** — It has been held that a general devise in terms of lands, tenements and hereditaments, in the absence of any other evidence of intention, will be construed to cover the mortgages owned by the de-

gagor may levy upon the equity of redemption from the second mortgage. *Johnson v. Stevens*, 1 Cush. 431.

¹ 2 Washb. on Real. Prop. 96, 97; Co. Lit. 205 a, Butler's note, 96; Jones on Mort., sects. 11-59; see *ante*, sect. 296; Williams on Real Prop. 422.

² *Connor v. Whitmore*, 52 Me. 185; *Collamer v. Langdon*, 29 Vt. 32; *Taft v. Stevens*, 3 Gray, 504; *Wilkins v. French*, 20 Me. 11; *Burt v. Kicker*, 6 Allen, 78; *Douglas v. Darin*, 57 Me. 121; *Kinna v. Smith*, 2 Green Ch. 14; *Dewey v. Van Deusen*, 4 Pick. 19; *Jackson v. DeLancey*, 11 Johns. 365; *s. c.*, 13 Johns. 535; *Great Falls Co. v. Worster*, 15 N. H. 412; *Chase v. Lockerman*, 11 Gill & J. 185; *Barnes v. Lee*, 1 Bibb. 526; *White v. Rittenmyer*, 30 Iowa, 272; *Norwich v. Hubbard*, 22 Conn. 587; *Richardson v. Hildreth*, 8 Cush. 225; *Webster v. Calden*, 56 Me. 204; *Smith v. Dyer*, 16 Mass. 18; *Haskins v. Hawkes*, 108 Mass. 379; *Palmer v. Stevens*, 11 Cush. 147; *George v. Baker*, 3 Allen, 326; *Burton v. Hintrager*, 18 Iowa, 351; *Green v. Hunt, Cooke (Tenn.)*, 344; *Demarest v. Wynkoop*, 3 Johns. Ch. 145.

visor.¹ But those decisions are from the English courts, which sustain the common-law theory of mortgages, and it is to be supposed that in the States, in which the lien theory has been more or less followed, a different conclusion would be reached.²

§ 321. **Merger of interests.** — The interests of the mortgagor and mortgagee are not separate and distinct titles to the land. They constitute together the one title, which can alone be predicated of property. When, therefore, the two interests unite in one person, the lesser or subordinate interest will generally merge in the greater, and be extinguished. The mortgagee's interest would be lost in the mortgagor's. But to effect a merger of interests, they must come together in one person at the same time, and in the same character or capacity. A conveyance of the equity to a trustee of the mortgagee, or to the mortgagee as trustee of another, would, in neither case, cause a merger.³ It is also a general rule in equity that the union of the two estates in one person will not be permitted to work a merger,

¹ *Jackson v. Delancey*, 13 Johns. 553-559; *Winn v. Littleton*, 1 Vern. 4; *Galliers v. Moss*, 9 B. & C. 267; *Braybrooke v. Inskip*, 8 Ves. 417 n; *Co. Lit.* 205 a, *Butler's note*, 96; *contra*, *Casborne v. Scarfe*, 1 Atk. 605; *Atty.-Gen. v. Vigor*, 8 Ves. 276; *Strode v. Russell*, 2 Vern. 625; *Wilkins v. French*, 20 Me. 111.

² *Moore v. Cornell*, 69 Pa. St. 3.

³ *Hunt v. Hunt*, 14 Pick. 384; *Lockwood v. Sturdevant*, 6 Conn. 387; *James v. Morey*, 2 Cow. 246; *Barnett v. Denniston*, 5 Johns. Ch. 35; *Gardner v. Astor*, 3 Johns. Ch. 53; *Stantons v. Thompson*, 49 N. H. 272; *White v. Hampton*, 13 Iowa, 259; *Burhans v. Hutcheson*, 25 Kan. 625; 37 Am. Rep. 274; *Wilhelmi v. Leonard*, *Id.* 330; *Gregory v. Savage*, 32 Conn. 264; *Edgerton v. Young*, 43 Ill. 464; *Shin v. Fredericks*, 56 Ill. 443; *Warren v. Warren*, 30 Vt. 530; *Clary v. Owen*, 15 Gray, 525; *Bean v. Boothby*, 57 Me. 295; *Purdy v. Huntington*, 42 N. Y. 334; 1 Am. Rep. 532; *Barker v. Flood*, 103 Mass. 474; *Model Lodging House Ass'n v. City of Boston*, 114 Mass. 133; *Pratt v. Bank of Bennington*, 10 Vt. 293; *Champney v. Coope*, 32 N. Y. 543; *Sherman v. Abbott*, 18 Pick. 448; *Bailey v. Richardson*, 15 E. L. & E. 218; *Dickason v. Williams*, 129 Mass. 182; 37 Am. Rep. 316.

where, from the circumstances, an injury would result to parties interested in either. The existence of an outstanding second mortgage would prevent a merger in the hands of a person holding the first mortgage and the equity of redemption.¹ And this is an almost universal rule, that equity will keep alive the mortgage in the hands of the holder of the equity whenever its merger would do injury to one in any way interested therein. Where, however, it is the plain intention of the parties that a merger should result from the union of the interests, equity will not interfere in their behalf.²

§ 322. **Possession of the mortgaged premises.** — It is a general custom in this country for the mortgagor to retain possession until the breach of the condition, and even afterwards it is not usual for the mortgagee to enter into posses-

¹ *Wade v. Howard*, 6 Pick. 492; *s. c.*, 11 Pick. 289; *Evans v. Kimball*, 1 Allen, 240; *Cook v. Brightly*, 46 Pa. s. c., 439; *Frazee v. Inslee*, 1 Green Ch. 239; *Vannice v. Bergen*, 16 Iowa, 502; *Lyon v. McIlvaine*, 24 Iowa, 12; *Grover v. Thatcher*, 4 Gray, 526; *Bell v. Woodward*, 34 N. H. 90; *Hancock v. Hancock*, 22 N. Y. 568; *Hill v. Pixley*, 63 Barb. 200; *Warren v. Warren*, 30 Vt. 530; *Land v. Lane*, 8 Metc. 517; *Lyon v. McIlvaine*, 24 Iowa, 9; *Grellet v. Heilshorn*, 4 Nev. 526; *New England Jewelry Co. v. Merriam*, 2 Allen, 390; *Dutton v. Ives*, 5 Mich. 515; *Stantons v. Thompson*, 49 N. H. 272.

² *Forbes v. Moffatt*, 18 Ves. 334; *Gibson v. Crehore*, 3 Pick. 475; *Hunt v. Hunt*, 14 Pick. 374; *Hatch v. Kimball*, 14 Me. 9; *Bell v. Woodward*, 34 N. H. 90; *St. Paul v. Viscount Dudley and Ward*, 15 Ves. 167; *Grover v. Thatcher*, 4 Gray, 526; *Duncan v. Drury*, 9 Pa. St. 332; *Marshall v. Wood*, 5 Vt. 254; *Walker v. Baxter*, 26 Vt. 710; *Robinson v. Leavitt*, 7 N. H. 73; *Moore v. Beasom*, 44 N. H. 215; *Hinds v. Ballou*, *Id.* 620; *Millsbaugh v. McBride*, 7 Paige Ch. 509; *Judd v. Seekins*, 62 N. Y. 266; *Bascom v. Smith*, 34 N. Y. 320; *Vanderkemp v. Shelton*, 11 Paige Ch. 28; *Loomer v. Wheelwright*, 3 Sandf. Ch. 157; *Simonton v. Gray*, 34 Me. 50; *Van Wagener v. Brown*, 26 N. J. L. 196; *Duncan v. Smith*, 31 N. J. L. 325; *Holden v. Pike*, 24 Me. 437; *Mallory v. Hitchcock*, 29 Conn. 127; *Dutton v. Ives*, 5 Mich. 515; *Edgerton v. Young*, 43 Ill. 464; *Davis v. Pierce*, 10 Minn. 376; *Carter v. Taylor*, 3 Head, 30; *White v. Hampton*, 13 Iowa, 259; *Snyder v. Snyder*, 6 Mich. 470; *Wallace v. Blair*, 1 Grant Cas. 75; *Brown v. Lapham*, 3 Cush. 551; *Eaton v. Simonds*, 14 Pick. 98; *James v. Morey*, 2 Cow. 285; *Savage v. Hall*, 12 Gray, 364; *Thompson v. Chandler*, 7 Me. 377; *Fletcher v. Chase*, 16 N. H. 42; *Bullard v. Leach*, 27 Vt. 491.

sion until the land has been decreed to him by foreclosure. But in those States where the common-law theory prevails in its full force, the mortgagee may enter into possession at any time after the delivery of the mortgage. He possesses the freehold, and can exercise all the rights of ownership over the land. And if the mortgagor should resist his demand for possession, he may bring an action of ejectment for its recovery.¹ But in some of the States, where the common law has been modified in this respect by statute or judicial legislation, the mortgagor is entitled to possession until condition broken, but after condition broken the mortgagee has the right of possession, the same as at common law.² In other States, where the lien theory has met

¹ *Ersine v. Townshend*, 2 Mass. 493; *Goodwin v. Richardson*, 11 Mass. 473; *Duval v. McLoskey*, 1 Ala. 708; *Knox v. Easton*, 38 Ala. 345; *Bradley v. Fuller*, 23 Pick. 1; *Page v. Robinson*, 10 Cush. 99; *Wales v. Miller*, 1 Gray, 512; *Chamberlain v. Thompson*, 10 Conn. 243; *Middletown Sav. Bk. v. Bates*, 11 Conn. 519; *Blaney v. Bearce*, 2 Greenl. 132; *Furbish v. Goodwin*, 29 N. H. 321; *Harper v. Ely*, 10 Ill. 581; *Delahay v. Clement*, 3 Scam. 202; *Karnes v. Lloyd*, 52 Ill. 113; *Chellis v. Stearns*, 22 N. H. 312; *Howard v. Houghton*, 64 Me. 445; *Stewart v. Barrow*, 7 Bush, 368; *Sedman v. Sanders*, 2 Dana, 68; *Rev. Stat. Me.* (1871), ch. 90, sect. 2; *Treat v. Pierce*, 53 Me. 77; *Brown v. Stewart*, 1 Md. Ch. 87; *Sumwalt v. Tucker*, 34 Md. 89; *Annapolis, etc., R. R. v. Gault*, 39 Md. 115; *Hemphill v. Ross*, 66 N. C. 477; *Jackson v. Dubois*, 4 Johns. 216; *Jackson v. Hull*, 10 Johns. 481; *Ellis v. Hussey*, 66 N. C. 501; *Tryon v. Munson*, 77 Pa. St. 250; *Youngman v. R. R. Co.*, 65 Pa. St. 278; *Den v. Stockton*, 12 N. J. L. 322; *Shute v. Grimes*, 7 Blackf. 1; *Ely v. McGuire*, 2 Ohio, 223; *Carpenter v. Casper*, 6 R. I. 542; *Waterman v. Matteson*, 4 R. I. 539; *Henshaw v. Wells*, 9 Humph. 568; *Vance v. Johnson*, 10 Humph. 214; *Faulkner v. Brockenbrough*, 4 Rand. 245; *Tripe v. Marcy*, 39 N. H. 439; *Trustees v. Dickson*, 1 Freem. Ch. 474; *May v. Fletcher*, 14 Pick 525; *Clark v. Beach*, 6 Conn. 142. And he may likewise have trespass against the mortgagor, even before condition broken, for waste, or for resisting his entry. *Smith v. Johns*, 3 Gray, 517; *Northampton Mills v. Ames*, 8 Metc. 1; *Page v. Robinson*, 10 Cush. 99; *Newall v. Wright*, 3 Mass. 138; *Furbish v. Goodwin*, 29 N. H. 321; *Clark v. Bench*, *supra*.

² *Cheever v. Rutland & B. R. R.*, 39 Vt. 653; *Wilson v. Hooper*, 13 Vt. 653; *Wallop v. McKinney*, 10 Mo. 229; *Sutton v. Mason*, 38 Mo. 120; *McIntyre v. Whitfield*, 13 Smed. & M. 88; *Kannady v. McCarron*, 18 Ark. 166; *Doe v. Pendleton*, 15 Ohio, 735; *Frische v. Cramer*, 16 Ohio, 125; *Watson v. Dickens*, 12 Smed. & M. 608; *Reynolds v. Canal & Banking Co. of N. O.*, 30 Ark.

with more or less favor, the mortgagee is not entitled to possession until the mortgage is foreclosed and the estate made absolute in the mortgagee.¹ And it has been held in some of the last class of cases that, although the mortgagor is lawfully in possession, and cannot be ejected even after the condition has been broken, yet if he delivers the possession to the mortgagee, he cannot by any action regain it as long as the mortgage is not satisfied. His only remedy is to redeem the mortgage.²

§ 323. **Special agreements in respect to possession.**— But the right to possession before foreclosure may be

520; *Hall v. Tunnell*, 1 Houst. 320; *Newbold v. Newbold*, 1 Del. Ch. 310; *Hill v. Robertson*, 24 Miss. 368; *Johnson v. Houston*, 47 Mo. 227; *Reddick v. Gressman*, 49 Mo. 389; *Pease v. Pilot Knob Iron Co.*, 49 Mo. 124; *Sanderson v. Price*, 1 Zab. 646; *Shields v. Lozear*, 34 N. J. L. 496; 3 Am. Rep. 256; *Hagar v. Brainerd*, 44 Vt. 294; *Walker v. King*, 44 Vt. 601; *Allen v. Everly*, 24 Ohio St. 602; *Rands v. Kendall*, 15 Ohio, 671.

¹ Civil Code Cal., sect. 2927; *Nagle v. Macy*, 9 Cal. 426; *Dutton v. Warschauer*, 21 Cal. 609; *Grattan v. Wiggins*, 23 Cal. 26; *Drake v. Root*, 2 Col. 685; *Bush Dig. of Stat. (Fla.)* 1872, p. 611; *Vason v. Ball*, 56 Ga. 268; *Elfe v. Cole*, 26 Ga. 197; *Davis v. Anderson*, 1 Ga. 176; *Iowa Code* (1873), 357; 2 G. & H. Stat. 335 (Ind.); *Smith v. Parks*, 22 Ind. 61; *Chase v. Abbott*, 20 Iowa, 158; *Dassler's Stat. Kan.* (1876), ch. 68, sect. 1; *Ducland v. Rousseau*, 2 La. An. 168; *Comp. Laws Mich.* (1871) 1775; *Gorham v. Arnold*, 22 Mich. 247; *Adams v. Corriston*, 7 Minn. 456; *Berthold v. Fox*, 13 Minn. 501; *Kyger v. Ryley*, 2 Neb. 20; *Webb v. Hoselton*, 4 Neb. 308; 2 Rev. Stat. N. Y., p. 312, sect. 57; *Murray v. Walker*, 31 N. Y. 396; *Trimm v. Marsh*, 54 N. Y. 604; *Besser v. Hawthorne*, 3 Oreg. 129; *Thayer v. Cranmer*, 1 McCord Ch. 395; *Nixon v. Bynum*, 1 Bailey, 148; *Hughes v. Edwards*, 9 Wheat. 489; *Durand v. Isaacks*, 4 McCord, 54; *Wright v. Henderson*, 12 Texas, 43; *Walker v. Johnson*, 37 Texas, 127; *Word v. Trask*, 7 Wis. 566. But where the common-law rule has been changed by statute, the statute will not affect the mortgagee's right of possession under the mortgages already in existence. The statute will only apply to future mortgages. *Blackwood v. Van Vleet*, 11 Mich. 252; *Morgan v. Woodward*, 1 Ind. 321; *Shaw v. Hoadley*, 8 Blackf. 165.

² *Hubbell v. Moulson*, 53 N. Y. 225; *Mickles v. Townsend*, 18 N. Y. 584; *Watson v. Spence*, 20 Wend. 260; *Den v. Wright*, 7 N. J. L. 175; *Mitchell v. Bogan*, 11 Rich. L. 681; *Hennesy v. Farrell*, 20 Wis. 42; *Stark v. Brown*, 12 Wis. 572; *Roberts v. Sutherland*, 4 Oreg. 219; *Pace v. Chadderdon*, 4 Minn. 49; *Frink v. LeRoy*, 49 Cal. 314; *Dutton v. Warschauer*, 21 Cal. 609; *Eyster v. Gaff*, 2 Col. 228; *Avery v. Judd*, 22 Wis. 262; *Newton v. McKay*, 30 Mich. 380.

changed by agreement of the parties. If, according to the law, the mortgagor is entitled to possession, by agreement the mortgagee may be given a right of entry at any time before foreclosure; and if the mortgagee has by law the right of possession, his right of entry may be restrained until condition broken, or taken away altogether. If the purposes and the object of the mortgage require the possession to be given to the party not entitled thereto by law, the agreement to vest it in him will be implied from those circumstances. The implication must, however, be a necessary one; otherwise nothing but an express agreement will have that effect.¹

§ 324. **Rents and profits.** — Whoever is in actual possession is entitled to the rents and profits issuing out of the mortgaged premises. If it be the mortgagor, he takes them free from any claim on the part of the mortgagee, even where he is in possession by sufferance only, and where the property is not sufficient to satisfy the mortgage-debt.² The mortgagee is entitled to a judgment for rents

¹ *Flagg v. Flagg*, 11 Pick. 475; *Hartshorn v. Hubbard*, 2 N. H. 453; *Smith v. Parks*, 22 Ind. 61; *Brown v. Cram*, 1 N. H. 169; *Chase v. Abbott*, 20 Iowa, 158; *Wales v. Mellen*, 1 Gray, 512; *Dearborn v. Dearborn*, 9 N. H. 117; *Clay v. Wren*, 34 Me. 187; *Norton v. Webb*, 35 Me. 218; *Brown v. Leach*, 35 Me. 39; *Duval v. McLoskey*, 1 Ala. 708; *Knox v. Easton*, 38 Ala. 345; *Fogarty v. Sawyer*, 17 Cal. 589; *Carroll v. Ballance*, 26 Ill. 9; *Chicks v. Willetts*, 2 Kan. 384; *Stewart v. Barrow*, 7 Bush, 368; *Redman v. Sanders*, 2 Dana, 68; *Brown v. Stewart*, 1 Md. Ch. 87; *Leighton v. Preston*, 9 Gill, 201; *George's Creek Coal, etc., Co. v. Detmold*, 1 Md. 237. But the right will not be implied from a silent acquiescence in the mortgagor's possession, or inferred from a clause in the mortgage that the mortgagee shall take possession upon default. *Stowell v. Pike*, 2 Greenl. 387; *Brown v. Cram*, 1 N. H. 169; *Rogers v. Grazebrook*, 8 Q. B. 898. But see *Jackson v. Hopkins*, 18 Johns. 487. Nor would a parol agreement change the law in reference to the right of possession. *Colman v. Packard*, 16 Mass. 39.

² *Boston Bk. v. Reed*, 8 Pick. 459; *Mayo v. Fletcher*, 14 Pick. 525; *Kunkle v. Wolfersberger*, 6 Watts, 131; *Noyes v. Rich*, 52 Me. 115; *Gilman v. Ill. & Miss. Tel. Co.*, 91 U. S. 603; *Johnson v. Miller*, 1 Wills, 416; *Gelston v. Burr*, 11 Johns. 482; *Astor v. Turner*, 11 Paige, 436; *Mitchell v. Bartlett*, 52 Barb.

and profits from the date of the decree of foreclosure, or, if he has a right to possession before foreclosure, from his demand for possession, when he follows up such demand either by foreclosure or an action of ejectment.¹ If the mortgagee is in possession he is entitled to the rents and profits accruing after his entry. And where the land has been leased by the mortgagor, the entry of the mortgagee

319; *Clason v. Corley*, 5 Sandf. 447; *Wilder v. Houghton*, 1 Pick. 87; *Pullan v. C. & C. Air Line R. R.*, 5 Biss. 237. It is held in Massachusetts, that if the mortgaged property is not sufficient in value to satisfy the debt, after entry to foreclose the mortgagee may recover of the mortgagor for past use and occupation. *Merrill v. Bullock*, 105 Mass. 486; *Morse v. Merritt*, 110 Mass. 458. And even where the mortgagor is in possession by lawful right, if the property is an insufficient security, the mortgagee may apply for the appointment of a receiver, and the rents and profits accruing thereafter will be applied to the liquidation of the debt. *Post v. Dorr*, 4 Edw. Ch. 412; *Lofsky v. Maujer*, 3 Sandf. Ch. 69; *Astor v. Turner*, 11 Paige, 436; *Clason v. Corley*, 5 Sandf. Ch. 447; *Mitchell v. Bartlett*, 51 N. Y. 442; *Myers v. Estell*, 48 Miss. 372; *Douglass v. Cline*, 12 Bush, 608. But to entitle the mortgagee to the appointment of a receiver, special equitable grounds must be alleged; for example, that the mortgagor is insolvent, and the security insufficient. If the mortgagor is solvent, or the mortgagee possesses other means of protecting himself, the insufficiency of the mortgage security will not support an application for a receiver. *Bk. of Ogdensburg v. Arnold*, 5 Paige, 40; *Williams v. Robinson*, 16 Conn. 517; *Shotwell v. Smith*, 3 Edw. Ch. 588; *Quincy v. Cheeseman*, 4 Sandf. Ch. 405; *Corttey v. Hathaway*, 11 N. J. Eq. 39; *Hackett v. Snow*, 10 Ired. 220; *Oliver v. Decatur*, 4 Cranch C. Ct. 458; *Frisbie v. Bateman*, 24 N. J. Eq. 28; *Williamson v. New Albany R. Co.*, 1 Biss. 201; *Whitehead v. Wooten*, 43 Miss. 523; *Pullan v. C. & C. R. R.*, 4 Biss. 35; *First Nat. Bk. v. Gage*, 79 Ill. 206; *Callanan v. Shaw*, 19 Iowa, 183; *Morrison v. Buckner*, 1 Hempst. 442; *Syracuse Bk. v. Tallman*, 31 Barb. 201.

¹ *Wilder v. Houghton*, 1 Pick. 87; *Mayo v. Fletcher*, 14 Pick. 525; *Haven v. Adams*, 8 Allen, 368; *Northampton Mills v. Ames*, 8 Metc. 1; *Hill v. Jordan*, 30 Me. 367; *Bk. of Washington v. Hupp*, 10 Gratt. 23; *Jones on Mort.* 670. This rule naturally can apply only to strict foreclosure, where the mortgagee is not entitled to possession after default. And where in strict foreclosure a certain time is given after the decree, within which the land might still be redeemed, the judgment for rents and profits can only be had after this period of redemption. And where the property is sold under foreclosure, the rents and profits do not accrue to the purchaser until the delivery of the deed to him, and perhaps not until he has made a demand for possession under his deed. *Clason v. Corley*, 5 Sandf. Ch. 447; *Mitchell v. Bartlett*, 52 Barb. 319; *Astor v. Turner*, 11 Paige, 436.

vests in him the right to call upon the lessee to pay the rent to him.¹ If, however, the lease be subject to the mortgage, *i.e.*, executed subsequently, since there is no privity of estate between the mortgagee and the lessee, either party may consider the lease defeated by the entry, and no rent will become due thereon, if either party should so elect. And any agreement between the parties looking to a continuance of the lease, is in fact a new lease.² But where the lease takes precedence to the mortgage, the entry of the mortgagee will not defeat the lease in any event. The mortgagee may, however, compel the lessee to pay to him all rent accruing after entry, which has not been paid over to the mortgagor before the lessee received notice of the execution of the mortgage. But payment to the mortgagor before such

¹ *Smith v. Shepherd*, 15 Pick. 147; *Stone v. Patterson*, 19 Pick. 476; *Kimball v. Lockwood*, 6 R. I. 139; *Russell v. Allen*, 2 Allen, 42; *Welch v. Adams*, 1 Metc. 494; *Hill v. Jordan*, 30 Me. 367; *Northampton Mills v. Ames*, 8 Metc. 1; *Turner v. Cameron*, 5 Exch. 932; *Pope v. Biggs*, 9 B. & C. 245; *Bk. of Washington v. Hupp*, 10 Gratt. 23.

² *Russell v. Allen*, 2 Allen, 44; *Smith v. Shepherd*, 15 Pick. 147; *Mayo v. Fletcher*, 14 Pick. 525; *Watts v. Coffin*, 11 Johns. 495; *Jones v. Clark*, 20 Johns. 51; *Jackson v. Delancey*, 11 Johns. 365; *Kimball v. Lockwood*, 6 R. I. 138; *Syracuse City Bk. v. Tallman*, 31 Barb. 207; *Magill v. Hinsdale*, 6 Conn. 464; *McKircher v. Hawley*, 16 Johns. 289; *Hemphill v. Giles*, 66 N. C. 512; *Sanders v. Vansickles*, 8 N. J. L. 315; *Pope v. Biggs*, 9 B. & C. 245; *Peters v. Elkins*, 14 Ohio, 344; *Doe v. Hales*, 7 Bing. 322; *Knox v. Easton*, 38 Ala. 345; *Branch Bk. v. Fry*, 23 Ala. 770; *Lane v. King*, 8 Wend. 584; *Lynde v. Rowe*, 12 Allen, 110; *McDermott v. Burke*, 10 Cal. 580; *Gartside v. Outley*, 58 Ill. 210; 11 Am. Rep. 59; *Weaver v. Belcher*, 3 East, 449; *Rogers v. Humphreys*, 4 A. & E. 299; *Higginbotham v. Barton*, 11 Ad. & El. 307; *Henshaw v. Wells*, 8 Humph. 568; *Morse v. Goddard*, 13 Metc. 177; *Field v. Swan*, 10 Metc. 177. See *Hogsett v. Ellis*, 17 Mich. 351: The lessees in a subsequent lease must attorn in order to be liable to the mortgagee. A mere notice to pay rent will not render them liable. But judgment for *mesne* profits may be had if they continue in possession after demand. *Kimball v. Lockwood*, 6 R. I. 138; *Hill v. Jordan*, 35 Me. 367; *Northampton Mills v. Ames*, 8 Metc. 1; *Morse v. Goddard*, *supra*; *Field v. Swan*, *supra*; *Rogers v. Humphreys*, *supra*; *Evans v. Elliott*, 9 A. & E. 342. But without special agreement the acceptance of rent from the lessee will not bind the mortgagee to the terms and duration of the original lease. It creates only a tenancy from year to year. *Hughes v. Bucknell*, 8 C. & P. 566.

notice, even of rent in advance which falls due afterwards, if *bona fide*, will constitute a good defence to any action by the mortgagee.¹

§ 325. **Mortgagee's liability for rents received.** — The mortgagee receives the rents and profits, not in his own right, but as trustee or agent for himself and the mortgagor. After deducting the necessary expenses of managing the estate, he must apply them, first, to the liquidation of the accruing interest, and then of the principal of the debt. Whatever surplus remains he holds in trust for the mortgagor, and all others claiming under him.² And although

¹ Rogers v. Humphreys, 4 Ad. & E. 299; Moss v. Gallimore, Dougl. 279; Fitchburg Cotton Co. v. Melvin, 15 Mass. 268; Burden v. Thayer, 3 Me. 79; Mirick v. Hoppin, 118 Mass. 582; Babcock v. Kennedy, 1 Vt. 457; McKircher v. Hawley, 16 Johns. 289; Russell v. Allen, 2 Allen, 42; Demarest v. Willard, 8 Cow. 206; Kimball v. Lockwood, 6 R. I. 138; Baldwin v. Walker, 21 Conn. 168; Coker v. Pearsall, 6 Ala. 542; Henshaw v. Wells, 9 Humph. 568; Myers v. White, 1 Rawle, 353; Weidner v. Foster, 2 Penn. 23; Hemphill v. Giles, 66 N. C. 512; see De Nicholls v. Saunders, L. R. 5 C. P. 589; Castleman v. Belt, 2 B. Mon. 157.

² Bailey v. Myrick, 52 Me. 136; King v. Ins. Co., 7 Cush. 7; Ten Eyck v. Craig, 62 N. C. 406; Clark v. Bush, 3 Cow. 151; Harrison v. Wyse, 24 Conn. 1; Reitenbaugh v. Ludwick, 31 Pa. St. 131; Seaver v. Durant, 39 Vt. 105; Kellogg v. Rockwell, 19 Conn. 446; Hunt v. Maynard, 6 Pick. 489; Thorp v. Feltz, 6 B. Mon. 6; Breckenridge v. Brook, 2 A. K. Marsh. 335; Gibson v. Crehore, 5 Pick. 146; Davis v. Lassiter, 20 Ala. 561; Walton v. Wittington, 9 Mo. 545; Anthony v. Rogers, 20 Mo. 281; McConnell v. Holobush, 11 Ill. 61; Brayton v. Jones, 5 Wis. 117; Ten Eyck v. Casad, 15 Iowa, 524; Hill v. Hewitt, 35 Iowa, 563; Freytag v. Hoeland, 23 N. J. Eq. 36; Anderson v. Lanterman, 27 Ohio St. 104; Chapman v. Smith, 9 Vt. 153; Strang v. Allen, 44 Ill. 428; Gilman v. Wills, 66 Me. 273. But the mortgagee is only accountable for the rents and profits in equity, and then only as an incident to an action for foreclosure, or for the redemption of the mortgaged premises. Farrall v. Lovel, 3 Atk. 723; Gordon v. Hobart, 2 Story, 243; Hubbell v. Moulson, 53 N. Y. 225; Boston Iron Co. v. King, 2 Cush. 400; Seaver v. Durant, 39 Vt. 103; Weeks v. Thomas, 21 Me. 465; Givens v. McCalmott, 4 Watts, 464; Bell v. Mayor N. Y., 10 Paige, 49. And where the rents and profits collected by the mortgagee are more than sufficient to satisfy the mortgage debt, and the mortgagee is irresponsible, a receiver may be appointed, pending the action to redeem, to take charge of subsequently accruing rents. Bolles v. Duff, 35 How. Pr. 481; Quinn v. Brithaige, 3 Edw. Ch. 314. Until applied by judg-

he does not, by taking possession of the land, assume the responsibilities of a guarantor of the rents, in the collection of the rent he is under an obligation to use that care, which might be expected from a reasonably prudent man. And if, by reason of his negligence in respect thereto, any portion of the rents and profits was lost, he would be held responsible for them to the same extent as if he had actually received them. Where he enters into possession before the breach of the condition, a much greater degree of care is required of him than after the breach.¹ And as a corollary to this rule, if the mortgagee fails to obtain as high a rent as he might have secured — as where he refuses to let to

ment of the court to the payment of the debt, there is no legal satisfaction of the mortgage by the receipt of rents and profits to the full amount of the mortgage-debt. *Hubbell v. Moulson*, 53 N. Y. 225; 13 Am. Rep. 519.

¹ *Hood v. Easton*, 2 Giff. 692; *Robertson v. Campbell*, 2 Call. 421; *Hughes v. Williams*, 12 Ves. 493; *Sparhawk v. Wills*, 5 Gray, 429; *Strong v. Blanchard*, 4 Allen, 538; *Richardson v. Wallis*, 5 Allen, 78; *Saunders v. Frost*, 5 Pick. 259; *Barnard v. Jennison*, 27 Mich. 230; *Shaeffer v. Chambers*, 2 Halst. 548; *Milliken v. Bailey*, 61 Me. 316; *Van Buren v. Olmstead*, 5 Paige Ch. 9; *Walsh v. Rutgers Ins. Co.*, 13 Abb. Pr. 33; *Barron v. Paulling*, 38 Ala. 292; *Hogan v. Stone*, 1 Ala. 496; *Moore v. Titman*, 44 Ill. 367; *Strong v. Allen*, 44 Ill. 428; *Bainbridge v. Owen*, 2 J. J. Marsh. 463; *Benham v. Rowe*, 2 Cal. 387; *Harper v. Ely*, 70 Ill. 581; *George v. Wood*, 11 Allen, 42; *Hubbard v. Shaw*, 12 Allen, 122; *Givens v. McCalmont*, 4 Watts, 460; *Lupton v. Almy*, 4 Wis. 242; *Ackerman v. Lyman*, 20 Wis. 454; *Guthrie v. Kahle*, 46 Penn. 333; *Gerrish v. Black*, 104 Mass. 400; *Miller v. Lincoln*, 6 Gray, 556; *Brandon v. Brandon*, 10 W. R. 287; *Hagthorp v. Hook*, 1 Gill & J. 270; *Reynolds v. Canal & B'k'g Co.*, 30 Ark. 520. If he has kept no account of the rents and profits received, the mortgagee will be charged with a reasonable rent, *i.e.*, what might be had with proper diligence. *Dexter v. Arnold*, 2 Sumn. 108; *Gordon v. Lewis*, *Ib.* 150; *Van Buren v. Olmstead*, 5 Paige, 9; *Clark v. Smith*, 1 N. J. Eq. 121; *Montgomery v. Chadwick*, 7 Iowa, 114. And if the mortgagee remains in possession himself, he will be charged for rent to the full value of the land, the amount being determined by expert testimony. *Gordon v. Lewis*, *supra*; *Montgomery v. Chadwick*, *supra*; *Holabird v. Burr*, 17 Conn. 556; *Kellogg v. Rockwell*, 19 Conn. 446; *Moore v. Cable*, 1 Johns. Ch. 385; *Chase v. Palmer*, 25 Me. 341; *Trulock v. Robey*, 15 Sim. 265; *Van Buren v. Olmstead*, *supra*; *Moore v. Degraw*, 5 N. J. Eq. 346; *Powell v. Williams*, 14 Ala. 476; *Johnson v. Miller*, 1 Wils. 416; *Sanders v. Wilson*, 34 Vt. 318; *Barrett v. Nielson*, 54 Iowa, 41; 37 Am. Rep. 183.

the tenant offering the highest rent — he will be liable for this loss. But a clear case of negligence or wilful disregard of the mortgagor's interest must be established, in order to hold him to account on this ground. The mere failure to obtain the highest rent possible is not a sufficient ground of liability.¹ Where the rents and profits have been increased by permanent improvements made by himself, whether he is accountable for such increase to the mortgagor depends upon the character of the improvements. If they be in the nature of accessions to the land, or, in other words, fixtures, the erection of costly buildings, etc., he need not account for the increased rents and profits, unless the mortgagor has indemnified him for the cost of their erection, or he has been so paid by the use of them. But where the improvement is the result of his labor upon the land, or where wild lands have been cleared, he must make returns of such improved rents.²

§ 326. **Tenure between mortgagor and mortgagee — Adverse possession.** — Whether the actual possession is held by the mortgagor or mortgagee, there is such a tenure existing between them that, for the purpose of protecting each other's title and seisin, the possession of one is deemed the possession of the other. If the one in possession is disseised, it will work the disseisin of the other; and where one is seised, a third person cannot set up a title by adverse possession against the other.³ The mortgagee is estopped

¹ *Hughes v. Williams*, 12 Ves. 493; *Hubbard v. Shaw*, 12 Allen, 123; *Rowe v. Wood*, 2 J. & W. 553; *Anon.*, 1 Vern. 45; *Jones on Mort.*, sect. 1123.

² *Moore v. Cable*, 1 Johns. Ch. 385; *Bell v. Mayor of N. Y.*, 10 Paige Ch. 49; *Morrison v. McLeod*, 2 Ired. 108; *Montgomery v. Chadwick*, 7 Iowa, 134; *Clark v. Smith*, 1 N. J. Eq. 121; *Givens v. McCalmont*, 4 Watts, 460. See 2 Washb. on Real Prop. 224, 225; but see *Merriam v. Barton*, 14 Vt. 501; *Stoney v. Shultz*, 1 Hill, 464.

³ *Birch v. Wright*, 1 T. R. 383; *Cholmondeley v. Clinton*, 2 Meriv. 360; *Poignard v. Smith*, 8 Pick. 272; *Sheafe v. Gerry*, 18 N. H. 247; *Dadmun v. Lamson*, 9 Allen, 85; *Lincoln v. Emerson*, 108 Mass. 87; *Doe v. Barton*, 11 A.

by his deed from denying the title of the mortgagor, and if he procures releases from persons claiming a superior title to the mortgaged premises, such deeds enure to the benefit of the mortgagor upon his payment of the expenses incurred in purchasing the superior title.¹ So also, will the mortgagor not be permitted to set up against the mortgagee a paramount title which he has acquired subsequently to the execution of the mortgage.² Before condition broken, neither the mortgagor nor the mortgagee can dispossess the other by any denial of title; but after the breach of the condition, the party in possession may acquire, by acts of hostility, such an adverse possession as will bar the other's title under the Statute of Limitations. The statute begins to run from the time of forfeiture; it cannot before. After the lapse of the statutory period of limitation the mortgagor loses his equity of redemption, and the mortgagee his right to foreclose; and whoever is in possession acquires an absolute title to the land. The respective assignees are governed by the same rules.³ But any act by the party in possession,

& E. 307; *Partridge v. Bere*, 5 B. & Ald. 604; *Nichols v. Reynolds*, 1 R. I. 30; *Hunt v. Hunt*, 14 Pick. 374; *Newman v. Chapman*, 2 Rand. 93; *Herbert v. Hanrick*, 16 Ala. 581; *Boyd v. Beck*, 29 Ala. 703; *Root v. Bancroft*, 10 Me. 44; *Sheridan v. Welch*, 8 Allen, 166; *Currier v. Gale*, 9 Allen, 522; *Woods v. Hildebrand*, 46 Mo. 284; 2 Am. Rep. 513.

¹ *Brown v. Combs*, 5 Dutch. 36; *Doe v. Tunnel*, 1 Houst. 320; *Farmers' Bank v. Bronson*, 14 Mich. 369; *Connor v. Whitmore*, 52 Me. 185; *contra*, *Wright v. Sperry*, 25 Wis. 617; *Walthall v. Rives*, 34 Ala. 91.

² *Tefft v. Munson*, 57 N. Y. 97; *Lincoln v. Emerson*, 108 Mass. 87; *Fuller v. Hodgdon*, 25 Me. 243; *Conner v. Whitmore*, 52 Me. 185; *Miami Ex. Co. v. U. S. Bank*, *Wright*, 249; *Fair v. Brown*, 40 Iowa, 209; *Porter v. Lafferty*, 33 Iowa, 257; *Stears v. Hollenbeck*, 38 Iowa, 550; *Smith v. Lewis*, 20 Wis. 350; *Clark v. Baker*, 14 Cal. 632; *Avery v. Judd*, 21 Wis. 262. But if the mortgagee is under obligation to pay the taxes, the mortgagor may demand of him satisfaction for the expenses of the tax-title purchased in by him. *Eaton v. Tallmadge*, 22 Wis. 526.

³ *Hunt v. Hunt*, 14 Pick. 374; *Sheppard v. Pratt*, 15 Pick. 32; *Noyes v. Sturdivant*, 18 Me. 104; *Roberts v. Welch*, 8 Ired. 287; *Evans v. Huffman*, 5 N. J. L. 354; *Wilkinson v. Flowers*, 37 Miss. 579; *Waldo v. Rice*, 14 Wis. 286; *Chick v. Rollins*, 44 Me. 104; *Tripe v. Marcy*, 39 N. H. 439; *Inches v.*

which involves the recognition of the other's title, or is an acknowledgment that the mortgage-debt still exists, will rebut the presumption of adverse possession. Where the mortgagor is in possession, payment of the interest or a part of the principal of the mortgage-debt, and in the case of the mortgagee's possession, the acceptance of such payment, or rendering an account for the rents and profits, would be circumstances and facts, which would negative the hostility of the possession, and prevent the statute from running against the one out of possession.¹

Leonard, 12 Mass. 379 Crawford v. Taylor, 42 Iowa, 260; Roberts v. Littlefield, 48 Me. 61; Richmond v. Aiken, 26 Vt. 324; Haskell v. Bailey, 22 Conn. 569; Chick v. Rollins, 44 Me. 104; Rockwell v. Servant, 63 Ill. 424; Elkins v. Edwards, 8 Ga. 326; Giles v. Baremore, 5 Johns. Ch. 545; Bacon v. McIntire, 8 Metc. 87; Knowlton v. Walker, 13 Wis. 264; Bollinger v. Chouteau, 20 Mo. 89; Harris v. Mills, 28 Ill. 46; Hughes v. Edwards, 9 Wheat. 489; Nevitt v. Bacon, 32 Miss. 212; Humphrey v. Hurd, 29 Mich. 44; Green v. Turner, 38 Iowa, 112; Belmont v. O'Brien, 12 N. Y. 394; Moore v. Cable, 1 Johns. Ch. 385. Where the mortgagee enters into possession before condition broken, notice must be given to the mortgagor that he holds possession for the purpose of foreclosure, before the statute will run against the mortgagor's right to redeem. Newall v. Wright, 3 Mass. 138; Goodwin v. Richardson 11 Mass. 469; Scott v. McFarland, 13 Mass. 308. See Yarborough v. Newell, 10 Yerg. 376; Green v. Turner, 38 Iowa, 112; Hammonds v. Hopkins, 3 Yerg. 525. And where, by agreement of the parties, the mortgagee is to hold possession, until the mortgage-debt was paid out of the rents and profits, the statute does not begin to run, until his claim has been satisfied and he has given the mortgagor notice of his adverse holding. Anding v. Davis, 38 Miss. 574; Kohlheim v. Harrison, 34 Miss. 457; Quint v. Little, 4 Me. 495; Frink v. Le Roy, 49 Cal. 314. And no length of possession will bar the right to redeem, if by agreement the mortgagor has an unlimited time, within which to pay off the mortgage. Wyman v. Babcock, 2 Curtis, 386; Teulon v. Curtis, 1 Younge, 616. The possession of either party must be exclusive as well as adverse, in order that the statute may run. Burke v. Lynch, 2 Ba. & Be. 426; Archbold v. Scully, 9 H. L. Cas. 360; Drummond v. Sant, L. R. 6 Q. B. 763; Rakestraw v. Brewer, Seld. Cas. in Ch. 56. But see Lake v. Thomas, 3 Ves. jr. 17.

¹ To bar foreclosure, see Heyer v. Pruyn, 7 Paige, 465; Hughes v. Edwards, 9 Wheat. 490; Howard v. Hildreth, 18 N. H. 106; Cheaver v. Perley, 11 Allen, 584; Noyes v. Sturdivant, 18 Me. 104; Tripe v. Marcy, 39 N. H. 439; Zeller v. Eckert, 4 How. 295; Wright v. Eaves, 10 Rich. Eq. 582; Drayton v. Marshall, Rice's Eq. 383; Howland v. Shurtleff, 2 Metc. 26; Ayres v. Waite.

§ 327. **Insurance of the mortgaged premises.** — Both the mortgagor and the mortgagee have insurable interests in the premises, and they may insure their respective interests at the same time. The mortgagee can only insure to the amount of his debt. Where he takes out a policy in his own name, pays the premium, and cannot, by the terms of the mortgage, call upon the mortgagor to refund such payments, he takes the insurance money, in case of loss by fire, free from any right of the mortgagor to have it applied to the liquidation of the mortgage-debt. He can recover the insurance, and then proceed to collect the debt.¹ But if he insures the premises at the request of the mortgagor, or does so in consequence of the neglect of the mortgagor, and at his expense, as he may do if the mort-

10 Cush. 72; *Carberry v. Preston*, 13 Ired. Eq. 455; *Hough v. Bailey*, 32 Conn. 288; *Ward v. Carter*, L. R. 1 Eq. 29; *Frear v. Drinker*, 8 Pa. St. 520; *Hughes v. Blackwell*, 6 Jones Eq. 73; *Jackson v. Slater*, 5 Wend. 295; *Brocklehurst v. Jessop*, 7 Sim. 438. And see *Lord v. Morris*, 18 Cal. 432; *Cunningham v. Hawkins*, 24 Cal. 409; *Harris v. Mills*, 28 Ill. 44; *Perkins v. Sterne*, 23 Texas, 563. To bar the equity of redemption, see *Demarest v. Wynkoop*, 3 Johns. Ch. 129; *Limerick v. Voorhis*, 9 Johns. 129; *Pendleton v. Rooth*, 1 Giff. 35; *Stansfield v. Hobson*, 16 Beav. 236; *Edsell v. Buchanan*, 2 Ves. jr. 83; *Barron v. Martin*, 19 Ves. 327; *Hansard v. Hardy*, 18 Ves. 455; *Richardson v. Young*, L. R. 10 Eq. 297; *Calkins v. Calkins*, 20 N. Y. 147; *Marks v. Pell*, 1 Johns. Ch. 594; *Dexter v. Arnold*, 3 Sumn. 152; *Morgan v. Morgan*, 10 Ga. 297; *McNair v. Lee*, 34 Mo. 285; *Quint v. Little*, 4 Greenl. 495; *Shepherd v. Murdock*, 3 Murph. 218; *Roberts v. Littlefield*, 48 Me. 61; *Knowlton v. Walker*, 13 Wis. 264.

¹ *Ring v. State Ins. Co.*, 7 Cush. 1; *Sussex Mut. Ins. Co. v. Woodruff*, 2 Dutch. 541; *Excelsior Ins. Co. v. Ins. Co.*, 55 N. Y. 343; 14 Am. Rep. 271; *Kernschan v. Bowery Ins. Co.*, 17 N. Y. 428; *Norwich Ins. Co. v. Boomer*, 52 Ill. 442; 4 Am. Rep. 618; *Carpenter v. Ins. Co.*, 16 Pet. 495; *Russell v. Southard*, 12 How. 139; *Ætna Ins. Co. v. Tyler*, 16 Wend. 385; *Springfield Fire Ins. Co. v. Allen*, 43 N. Y. 389; 3 Am. Rep. 711; *White v. Brown*, 2 Cush. 412; *Harding v. Townsend*, 43 Vt. 536; *Dobson v. Land*, 8 Hare, 216; *Fowler v. Palmer*, 5 Gray, 549; *Clark v. Wilson*, 103 Mass. 219; *Williams v. Ins. Co.*, 107 Mass. 377; 9 Am. Rep. 41; *Bellamy v. Brickenden*, 2 John. & H. 137; *Ely v. Ely*, 80 Ill. 532; *Cushing v. Thompson*, 34 Me. 496; *Bean v. A. & St. L. R. R.*, 58 Me. 82; *King v. Mut. Ins. Co.*, 7 Cush. 1.

gage contains a covenant providing for the insurance of the premises by the mortgagor, the mortgagor will be subrogated to the benefit of the insurance, and the insurance money must be applied to the debt.¹ But, although the mortgagee is entitled, as against the mortgagor, to the full benefit of the insurance, where there is no covenant of insurance, it is not so certain that he will, as against the insurance company, be permitted to recover to his own use both the debt and the insurance money. Some of the courts hold that the insurance company will be subrogated to the rights of the mortgagee under the mortgage in the proportion that the insurance paid bears to the mortgage-debt;² while the courts of Massachusetts sustain the doctrine that he may recover both the insurance and the debt, discharged of any right of subrogation in the insurance company, on

¹ *Concord, etc., Ins. Co. v. Woodbury*, 45 Me. 447; *Graves v. Hampden Ins. Co.*, 10 Allen, 285; *Callahan v. Linthicum*, 43 Md. 97; 20 Am. Rep. 106; *Gordon v. Ware Sav. Co.*, 115 Mass. 588; *King v. Mut. Ins. Co.*, 7 Cush. 1; *Clark v. Wilson*, 103 Mass. 221; *Larrabell v. Lumbert*, 32 Me. 97; *Suffolk Ins. Co. v. Boyden*, 9 Allen, 123; *Waring v. Loder*, 53 N. Y. 581; *Mix v. Hotchkiss*, 14 Conn. 32; *Norwich Ins. Co. v. Boomer*, 52 Ill. 442; 4 Am. Rep. 618; *Fowler v. Palmer*, 5 Gray, 549; *Martin v. Franklin Fire Ins. Co.*, 38 N. J. L. 140; 20 Am. Rep. 372; *Nichols v. Baxter*, 5 R. I. 491. And when the mortgage contains an insurance clause, and an insurance policy is taken out by the mortgagee upon the default of the mortgagor to do so, the policy is presumed to be taken out for the benefit of both parties, and the mortgagee cannot refuse to apply it to the debt. *Foster v. VanReed*, 5 Hun, 321; *Buffalo Steam Engine Works v. Ins. Co.*, 17 N. Y. 406; *Clinton v. Hope Ins. Co.*, 45 N. Y. 454; *Waring v. Loder*, 53 N. Y. 581; *Honore v. Lamar Ins. Co.*, 51 Ill. 409. And in such cases, the fact that the debt has been paid will not prevent a recovery of the insurance money. The mortgagor's interest in the policy keeps it alive. *Norwich Ins. Co. v. Boomer*, *supra*; *Concord Ins. Co. v. Woodbury*, *supra*; *Waring v. Loder*, *supra*.

² *Concord Ins. Co. v. Woodbury*, 45 Me. 447; *Ætna Ins. Co. v. Tyler*, 16 Wend. 397; *Sussex Ins. Co. v. Woodruff*, 2 Dutch. 541; *Kernochan v. N. Y. Bowery Ins. Co.*, 17 N. Y. 428; *Ulster Co. Sav. Inst. v. Leake*, 73 N. Y. 161; 29 Am. Rep. 115; *Excelsior Ins. Co. v. Ins. Co.*, 55 N. Y. 343; 14 Am. Rep. 271; *Smith v. Columbia Ins. Co.*, 17 Pa. St. 253; *Honore v. Lamar Ins. Co.*, 51 Ill. 409; *Norwich Ins. Co. v. Boomer*, 52 Ill. 442; 4 Am. Rep. 618; *Callahan v. Linthicum*, 43 Md. 97; 20 Am. Rep. 106.

the ground that the premiums paid on the policy are a good and adequate consideration for the risk assumed, and prevent any claim on the part of the company to the equitable right of subrogation.¹ The mortgagor may insure to the

¹ *King v. Ins. Co.*, 7 Cush. 1; *Suffolk Ins. Co. v. Boyden*, 9 Allen, 123; *Clark v. Wilson*, 103 Mass. 221; *Foster v. Equitable Ins. Co.*, 2 Gray, 216; *Dobson v. Land*, 8 Hare, 216. In *King v. Ins. Co.*, *supra*, Chief Justice Shaw said: "He (the mortgagee) surely may recover of the mortgagor, because he is his debtor, and on good consideration has contracted to pay. The money received from the underwriters was not a payment of his debt; there was no privity of contract between the mortgagor and the underwriters; he had not contracted with them to pay it for him, on any contingency; he had paid them nothing for so doing. They did not pay because the mortgagor owed it; but because they had bound themselves, in the event which has happened, to pay a certain sum to the mortgagee." * * * "What, then, is there inequitable, on the part of the mortgagee, towards either party in holding both sums? They are both due upon valid contracts with him, made upon adequate considerations paid by himself. There is nothing inequitable to the debtor, for he pays no more than he originally secured in money loaned; nor to the underwriter, for he has only paid upon a risk voluntarily taken, for which he was paid by the mortgagee a full and satisfactory equivalent." Perhaps the true theory lies between these opposite positions of the courts. The Massachusetts court is undoubtedly correct in its position, that there is no equitable ground for the application of the doctrine of subrogation. But it is incorrect to go farther and hold that the mortgagee may recover both sums to his own use. A mortgagee insures only his interest in the mortgaged premises, and that interest is exhausted when the debt is paid. *Graves v. Hampden Ins. Co.*, 10 Allen, 283; *Sussex Ins. Co. v. Woodruff*, 2 Dutch. 541. From this position it is an easy step to say, that when the mortgage property after the loss by fire is sufficient to satisfy the mortgage-debt, and it is *actually* satisfied, either by foreclosure or by payment by the mortgagor, the mortgagee has sustained no loss. See *Etna Ins. Co. v. Tyler*, 16 Wend. 385; *Kernochan v. Bowery Ins. Co.*, 17 N. Y. 428; *Carpenter v. Providence, etc., Ins. Co.*, 16 Pet. 495; *Smith v. Columbia Ins. Co.*, 17 Pa. St. 253; *contra*, *Excelsior Ins. Co. v. Ins. Co.*, 55 N. Y. 343. The mortgagee may proceed either against the insurance company on the policy, or against the mortgagor on the mortgage, and neither of them can object, or compel him to proceed against both. Nor has either a claim against the other. But if the mortgagee does recover from both, the position of the mortgagee, in respect to the insurance company, is the same as if the mortgagor had paid the debt, before application had been made for the insurance money. In the latter case, he could not recover of the insurance company, for he had suffered no loss. And it would seem but natural, that the insurance company may be permitted to institute a suit against the mortgagee for money had and re-

full value of the premises, irrespective of the mortgagee's interest. A mortgage is not such an alienation as will defeat the policy of insurance — not even so far as to reduce the mortgagor's insurable interest to the equity of redemption.¹ And in the absence of the covenant requiring the mortgagor to keep the premises insured, the mortgagee has not the right to demand the appropriation of the insurance money to the payment of the mortgage-debt.² But where the mortgage calls for the insurance of the premises, and

received, if after the payment of the insurance money the mortgagor satisfied the mortgage. This position does not conflict with the rules of equity in reference to subrogation, while it is at the same time more consonant with the general principles underlying the law of insurance.

¹ *Strong v. Ins. Co.*, 10 Pick. 40; *Tuck v. Hartford Ins. Co.*, 56 N. H. 326; *Nichols v. Baxter*, 5 R. I. 494; *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507; 27 Am. Rep. 582; *Fame v. Wenans*, 1 Hopk. Ch. 283; *Stephens v. Mut. Ins. Co.*, 43 Ill. 325; *Dyers v. Ins. Co.*, 35 Ohio St. 606; 35 Am. Rep. 623; *Manhattan Ins. Co. v. Weill*, 28 Gratt. 382; 26 Am. Rep. 364; *Ill. Ins. Co. v. Stanton*, 57 Ill. 354; *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53; 4 Am. Rep. 582; *Hartford Ins. Co. v. Walsh*, 54 Ill. 164; Am. Rep. 115. And the mortgagor continues to have an insurable interest in the property, as long as his right of redemption is not completely barred. *Gordon v. Ins. Co.*, 2 Pick. 249; *Buffalo Steam Engine Co. v. Ins. Co.*, 17 N. Y. 401; *Cheney v. Woodruff*, 54 N. Y. 98; *Strong v. Ins. Co.*, *supra*; *Waring v. Loder*, 53 N. Y. 581. Although the existence of a mortgage does not reduce the insurable interest of the mortgagor, still it is held in some of the States that, if inquiry is made as to them, it becomes a material fact, and misrepresentations, concerning their existence or the amount secured by them, will vitiate the policy. *Davenport v. Ins. Co.*, 6 Cush. 340; *Brown v. People's Ins. Co.*, 11 Cush. 280; *Bowditch Ins. Co. v. Winslow*, 8 Gray, 38; *Packard v. Agawan Ins. Co.*, 2 Gray, 334; *Smith v. Columbia Ins. Co.*, 17 Pa. St. 253; *contra*, *Norwich Ins. Co. v. Boomer*, 52 Ill. 442; 4 Am. Rep. 618.

² *Carter v. Rockett*, 8 Paige Ch. 437; *Nichols v. Baxter*, 5 R. I. 491; *Hancox v. Fishing Ins. Co.*, 3 Sumn. 132; *Stearns v. Quincy Mut. Ins. Co.*, 124 Mass. 61; 26 Am. Rep. 647; *Wilson v. Hill*, 3 Metc. 66; *Vandegraaff v. Medlock*, 3 Port. 389; *Plimpton v. Ins. Co.*, 43 Vt. 497; *Columbia Ins. Co. v. Lawrence*, 10 Pet. 507; *Foster v. Van Reed*, 70 N. Y. 19; 26 Am. Rep. 544; *Carpenter v. Providence, etc., Ins. Co.*, 66 Pet. 495; *Thomas v. Vonkapff*, 6 Gill & J. 372; *McDonald v. Black*, 20 Ohio, 185; *Powles v. Innes*, 11 M. & W. 10; *Vernon v. Smith*, 5 B. & A. 1; *De Forest v. Fulton Ins. Co.*, 1 Hall, 103; *Fame v. Winnons*, 1 Hopk. Ch. 283; *Neale v. Reed*, 3 Dowl. & Ry. 158.

the mortgagor performs the covenant, the mortgagee acquires therein a beneficial interest, and is entitled to have the insurance money applied to the debt.¹ But where the loss is made payable to the mortgagor, or is assigned to the mortgagee without the consent of the company, alienation by the mortgagor of his interest will defeat the policy, even as to the mortgagee. For the complete protection of the mortgagee, the policy should be assigned to him with the consent of the company, and the assignment should be made to appear on the company's books as well as on the face of the policy. When the policy is in this shape, the mortgagee, in case of loss, receives the insurance money in trust to apply it to the debt, and such application may be enforced, not only by the mortgagor, but by every one claiming through him and subject to the mortgage. The surplus, if any, goes to the mortgagor and those in privity with him.²

¹ *Concord, etc., Ins. Co. v. Woodbury*, 45 Me. 447; *Gordon v. Ware Savings Ins. Co.*, 115 Mass. 588; *Cromwell v. Brooklyn Ins. Co.*, 44 N. Y. 42; *Carter v. Rockett*, 8 Paige, 437; *Norwich Ins. Co. v. Boomer*, 52 Ill. 442; *In re Sands Ale Brewing Co.*, 3 Biss. 175; *Miller v. Aldrich*, 31 Mich. 403; *Giddings v. Seevers*, 24 Md. 363; *Burns v. Collins*, 64 Md. 215; *Thomas v. Vonkapff*, 6 Gill & J. 372; *Nichols v. Baxter*, 5 R. I. 491.

² *Macomber v. Cambridge Ins. Co.*, 8 Cush. 133; *Grosvenor v. Atlantic Ins. Co.*, 17 N. R. 391; *Luckey v. Gannon*, 37 How. Pr. 134; *Boyd v. Cuddeback*, 31 Ill. 119; *King v. State Ins. Co.*, 7 Cush. 1; *Fowley v. Palmer*, 5 Gray, 549; *Graves v. Hampden Ins. Co.*, 10 Allen, 382; *Concord, etc., Ins. Co. v. Woodbury*, 45 Me. 447; *Larrabee v. Lumbert*, 32 Me. 97; *Waring v. Loder*, 53 N. Y. 581; *Clark v. Wilson*, 103 Mass. 221; *Mix v. Hotchkiss*, 14 Conn. 32. Where the insurance is obtained in the name of the mortgagor, but the policy contained a provision, that the loss, if any, is to be paid to the mortgagee; generally it is required that suit on the policy must be instituted in the mortgagee's name, or jointly with the mortgagor. *Ennis v. Harmony Ins. Co.*, 3 Bosw. 516; *Concord Mut. Ins. Co. v. Woodbury*, 45 Me. 447; *Grosvenor v. Atlantic Ins. Co.*, 17 N. Y. 391; *Norwich Ins. Co. v. Boomer*, 52 Ill. 442; 4 Am. Rep. 618; *Frink v. Hampden Ins. Co.*, 45 Barb. 334; *Martin v. Franklin Ins. Co.*, 33 N. J. L. 140. But with the consent of the mortgagee, the mortgagor may bring the suit alone in his own name. *Patterson v. Triumph Ins. Co.*, 64 Me. 500; *Farrow v. Ins. Co.*, 18 Pick. 53; *Jackson v. Farmers' Ins. Co.*, 5 Gray, 52; *Turner v. Quincy Ins. Co.*, 109 Mass. 563; *Illinois Ins. Co. v. Stanton*, 57 Ill. 354.

§ 328. **Assignment of the mortgage.** — Whether the mortgagee's interest be considered a legal estate or only a lien, it is clear, since the mortgage is in form a conveyance, and is required to be recorded like all other conveyances, that the proper mode of assigning it is by deed or instrument of the same character as the mortgage itself, either separate from or written on the back of the mortgage, together with the assignment and delivery of the instrument of indebtedness, if there be any. Such an assignment would vest the entire legal interest of the mortgagee in the assignee.¹ Whether a deed is absolutely required to assign the legal interest of the mortgagee depends upon the construction placed upon mortgages in the State in which the question arises. And, in determining this question, it must be observed that, although the assignment of the mortgage debt, irrespective of its effect upon the mortgage, will be governed by the *lex loci contractus*, the assignment of the mortgage itself must conform to the law of the place where the mortgaged land is situated.²

§ 329. **Common law assignment.** — At common law, and under the prevailing common-law theory, nothing less than a deed will be sufficient to pass the legal interest of the mortgagee.³ But the deed need not in express words be the

¹ Jones on Mort., sect. 786; 2 Washb. on Real Prop. 113-118.

² Story on Confl., sects. 363, 364; *Goddard v. Sawyer*, 9 Allen, 78. But this is not the case in regard to the equitable assignment of the mortgage, effected by the transfer of the debt. The equitable rights of the parties are governed by the *lex loci contractus*. See *Hoyt v. Thompson*, 19 N. Y. 207; *Dundas v. Bowler*, 3 McLean, 397; *Murrell v. Jones*, 40 Miss. 565.

³ *Warden v. Adams*, 15 Mass. 233; *Gould v. Newman*, 6 Mass. 239; *Parsons v. Welles*, 17 Mass. 419; *Adams v. Parker*, 12 Gray, 53; *Ruggles v. Barton*, 13 Gray, 506; *Prescott v. Ellingwood*, 23 Me. 345; *Douglass v. Durin*, 51 Me. 121; *Warren v. Homestead*, 33 Me. 256; *Mitchell v. Burnham*, 44 Me. 286; *Givan v. Tout*, 7 Blackf. 210; *Burton v. Baxter*, 7 Blackf. 297; *Henderson v. Pilgrim*, 22 Texas, 464; *Cottrell v. Adams*, 2 Biss. 351; *McChandles v. Engle*, 51 Pa. St. 309; *Twitchell v. McMurtrie*, 77 Pa. St. 383; *Kinna v. Smith*, 3 N. J. Eq. 14; *Graham v. Newman*, 21 Ala. 497; but in New Jersey

assignment of the mortgage. A quit-claim deed or an ordinary deed purporting to convey an absolute estate in fee will carry whatever legal interest the mortgagee has in the mortgaged premises, although it seems that it would have no effect upon the mortgage debt, unless it, too, was assigned. But a deed with a general warranty will in equity work an assignment of the debt, wherever the grantee has paid a valuable and substantial consideration for the same.¹ Under this theory an assignment of the mortgage debt would not operate as an assignment of the mortgage.² If the assignment of the mortgage does not carry with it the mortgage-debt, or the mortgage is assigned to one person and the debt to another, the assignee of the mortgage receives only the legal estate, which he holds in trust for the one who owns the debt.³ Such is also the rule at common

a seal is not now necessary. *Mulford v. Peterson*, 35 N. J. L. 127; *Hammond v. Lewis*, 1 How. 14.

¹ *Hunt v. Hunt*, 14 Pick, 374; *Welsh v. Priest*, 8 Allen, 165; *Savage v. Hall*, 12 Gray, 364; *Hill v. More*, 40 Me. 525; *Dorkey v. Noble*, 8 Me. 278; *Connor v. Whitmore*, 52 Me. 186; *Collamer v. Langdon*, 29 Vt. 32; *Givan v. Doe*, 7 Blackf. 210; *Severance v. Griffith*, 2 Lans. 38; *Weeks v. Eaton*, 15 N. H. 145; *Thompson v. Kenyon*, 100 Mass. 108; *Crooker v. Jewell*, 31 Me. 306. But where there is a separate instrument of indebtedness, in order to pass the debt, it must also be delivered, unless the deed is a warranty deed, when there will be an equitable assignment of the debt. *Lawrence v. Stratton*, 6 Cush. 163; *Ruggles v. Barton*, 13 Gray, 500; *Olmstead v. Elder*, 2 Sandf. Ch. 325; *Dixfield v. Newton*, 41 Me. 221; *Hobson v. Roles*, 20 N. H. 41; *Furbush v. Goodwin*, 25 N. H. 425; *Dearborn v. Taylor*, 18 N. H. 154; *Givan v. Doe*, 7 Blackf. 210; *Welsh v. Phillips*, 54 Ala. 309; 25 Am. Rep. 679; but see *Weeks v. Eaton*, 15 N. H. 145; *Hinds v. Ballou*, 44 N. H. 621. But see *post*, p. 248, note 1.

² *Adams v. Gray*, 12 Gray, 53; *Stanley v. Kempton*, 59 Me. 472; *Young v. Miller*, 6 Gray, 152; *Bourland v. Kipp*, 55 Ill. 376.

³ *Story Eq.*, sect. 1023 n; *Parsons v. Welles*, 17 Mass. 419; *Merritt v. Bartholick*, 36 N. Y. 44; *Thayer v. Campbell*, 9 Mo. 280; *Moore v. Ware*, 38 Me. 496; *Johnson v. Caudage*, 31 Me. 28; *Warren v. Homestead*, 33 Me. 256; *Heyes v. Wood*, 21 Vt. 331; *Jackson v. Willard*, 4 Johns. 41; *Aymar v. Bill*, 5 Johns. Ch. 570; *Center v. P. & M. Bank*, 22 Ala. 743; *Swan v. Japple*, 35 Iowa, 248; *Carter v. Bennett*, 4 Fla. 283; *Bell v. Morse*, 6 N. H. 205; *Hutchins v. Carleton*, 19 N. H. 487; *Bailey v. Gould*, Walk. (Mich.) 478;

law, where the debt upon the death of the mortgagee vested in the personal representatives, while the mortgage descended to his heirs in trust for the personal estate.¹ The assignee cannot acquire by such an assignment any beneficial interest in the mortgage, and the trust is binding upon him and all his privies who have actual or constructive notice. And where the mortgagor has notice of the assignments of the mortgage and debt to different persons, he cannot discharge the mortgage by payment or tender of payment to the assignee of the mortgage.² In a number of the States it is now held that the assignment of the mortgage without

Peters v. Jamestown Bridge Co., 5 Cal. 334; *Johnson v. Cornett*, 29 Ind. 59; *Langster v. Love*, 11 Iowa, 580; *Patton v. Pearson*, 57 Me. 434. To pass the beneficial interest in the mortgage, the mortgage-note or bond, if there be such, must be assigned with the mortgage, at least as against the mortgagor and subsequent assignees of the debt. *Bowers v. Johnson*, 49 N. Y. 432; *Kellogg v. Smith*, 25 N. Y. 18; *Merritt v. Bartholick*, 36 N. Y. 44; *King v. Harrington*, 2 Aik. 33; *Edgell v. Stanfords*, 3 Vt. 202; *Hitchcock v. Merrick*, 18 Wis. 357; *Warden v. Adams*, 15 Mass. 233. And the note or bond need not be indorsed, if delivered. *Pratt v. Skolfield*, 45 Me. 386; *King v. Harrington*, *supra*; *Pease v. Warren*, 29 Mich. 9; *contra*, *Kelly v. Burnham*, 9 N. H. 20. But where the debt has not been assigned to another, it may, as against the mortgagee, pass by assignment in equity to the assignee of the mortgage without any formal transfer, if it be the intention of the parties that the assignee should acquire a beneficial interest in the mortgage. *Merritt v. Bartholick*, 36 N. Y. 44; *Buckley v. Chapman*, 9 Conn. 5; *Northampton Bk. v. Balliet*, 8 W. & S. 311; *Phillips v. Bk. of Lewiston*, 18 Pa. St. 204; *Campbell v. Burch*, 1 Lans. 178; *Cooper v. Newland*, 17 Abb. Pr. 342. And where there is no separate instrument of indebtedness, the beneficial interest will always pass with the assignment of the mortgage unless it is expressly reserved. *Severance v. Griffith*, 2 Lans. 38; *Caryl v. Russell*, 7 Ib. 416; *Coleman v. Van Renssalaer*, 44 How. Pr. 368.

¹ 2 Washb. on Real Prop. 120, 121, 141; *Demarest v. Wynkoop*, 3 Johns. Ch. 145; *Jackson v. Delancey*, 11 Johns. 365; *Wilkins v. French*, 20 Me. 111; *Smith v. Dyer*, 16 Mass. 23; *Dewey v. Van Deusen*, 4 Pick. 19; *Kinna v. Smith*, 2 Green Ch. 14; *Chase v. Lockerman*, 11 Gill & J. 185; *Taft v. Stevens*, 3 Gray, 504; *Dexter v. Arnold*, 1 Sumn. 109; *Green v. Hunt, Cooke*, 344; *White v. Rittenmyer*, 30 Iowa, 272.

² *Mitchell v. Burnham*, 44 Me. 302; *James v. Johnson*, 6 Johns. Ch. 417; *Gregory v. Savage*, 32 Conn. 250; *Henderson v. Pilgrim*, 22 Texas, 464; *Bank v. Anderson*, 14 Iowa, 544; *Johnson v. Carpenter*, 7 Minn. 176. But the no-

the debt is a nullity; it conveys no estate to the assignee, and he may be treated as a trespasser by the mortgagor or the assignee of the debt.¹

§ 330. **Assignment under the lien theory.** — Although it is still held in those States which have, to a greater or less degree, discarded the common-law theory, that an effectual *legal* assignment of the mortgage requires a deed proved and acknowledged like all other deeds of conveyance, it is there held that, the debt being the principal thing and the mortgage only a security or lien, an assignment of the debt will operate as an equitable assignment of the mortgage, binding upon all persons having notice, and giving to the assignee the power in equity to exercise all the rights of the mortgagee.² Inasmuch as under the lien theory the mort-

tice must be actual. The record of the assignment is not constructive notice to the mortgagor. *Williams v. Sorrell*, 4 Ves. jr. 389; *Mitchell v. Burnham*, *supra*; *Wolcott v. Sullivan*, 1 Edw. Ch. 399; *Reed v. Marble*, 10 Paige Ch. 409; 3 Washb. on Real Prop. 316; see *post*, sect. 340.

¹ *Wilson v. Troup*, 2 Cow. 195; *Jackson v. Willard*, 4 Johns. 43; *Merritt v. Bartholick*, 36 N. Y. 44; *Purdy v. Huntington*, 42 N. Y. 346; *Huntington v. Smith*, 4 Conn. 235; *Ellison v. Daniels*, 11 N. H. 274; *Furbish v. Goodwin*, 25 N. H. 425; *Thayer v. Campbell*, 9 Mo. 280; *Burdett v. Clay*, 8 B. Mon. 287; *Willis v. Valette*, 4 Metc. (Ky.) 195; *Hays v. Lewis*, 17 Wis. 212; *Hill v. Edwards*, 11 Minn. 29; *Greve v. Coffin*, 14 Minn. 345; *Rankin v. Major*, 9 Iowa. 297; *Blair v. Bass*, 4 Blackf. 539; *Dick v. Mawry*, 9 Smed. & M. 448; *Bayley v. Gould*, Walk. (Mis.) 478; *McGan v. Marshall*, 7 Humph. 121; *Doe v. McLoskey*, 1 Ala. 708; *Martin v. Reynolds*, 6 Mich. 73; *Ladue v. R. R. Co.*, 13 Mich. 396; *Perkins v. Stearne*, 23 Texas, 563; *Peters v. Jamestown Bridge Co.*, 5 Cal. 335; *Nagle v. Marcy*, 9 Cal. 428. But if the mortgagee is in possession, the rule is different, and sufficient title passes to the assignee of the mortgage to give him the right of possession, which he can maintain against all who do not show a better title. *Smith v. Smith*, 15 N. H. 55; *Lamprey v. Nudd*, 29 N. H. 299; *Hinds v. Ballou*, 44 N. H. 487; *Wallace v. Goodall*, 18 N. H. 439; *Pickett v. Jones*, 63 Mo. 195.

² *Wolcott v. Winchester*, 15 Gray, 461; *Vose v. Handy*, 2 Greenl. 322; *Southerin v. Mendum*, 5 N. H. 420; *Northy v. Northy*, 45 N. H. 144; *Blake v. Williams*, 36 N. H. 39; *Langdon v. Keith*, 9 Vt. 299; *Keyes v. Wood*, 21 Vt. 331; *Lawrence v. Knap*, 1 Root, 248; *Dudley v. Caldwell*, 19 Conn. 218; *Neilson v. Blight*, 1 Johns. Cas. 205; *Evertson v. Booth*, 19 Johns. 491; *Par-melee v. Daun*, 23 Barb. 461; *Kortright v. Cady*, 21 N. Y. 261; *Wilson v.*

gagee has very few, if any, rights which are enforceable only in law, the equitable assignment of the mortgage affords sufficient protection for the assignee. This is particularly

Troup, 2 Cow. 242; Craft v. Webster, 4 Rawle, 242; Danley v. Hays, 17 Serg. & R. 400; Partridge v. Partridge, 38 Pa. St. 78; Hyman v. Devereux, 63 N. C. 624; Muller v. Wadlington, 5 S. C. 242; Wright v. Eaves, 10 Rich. Eq. 585; Scott v. Turner, 15 La. An. 346; Wilson v. Heyward, 2 Fla. 27; s. c., 6 Fla. 191; Emanuel v. Hunt, 2 Ala. 190; Graham v. Newman, 21 Ala. 497; Dick v. Mawry, 17 Miss. 448; Holmes v. McGinty, 44 Miss. 94; Martin v. McReynolds, 6 Mich. 70; Ladue v. R. R. Co., 13 Mich. 396; U. S. Bank v. Covert, 13 Ohio, 240; Paine v. French, 4 Ohio, 318; Miles v. Gray, 4 B. Mon. 417; Burdett v. Clay, 8 Ib. 287; Lucas v. Harris, 20 Ill. 165; Mapps v. Sharpe, 32 Ill. 165; Laberge v. Chauvin, 2 Mo. 179; Anderson v. Baumgartner, 27 Mo. 80; Potter v. Stevens, 40 Mo. 229; Burton v. Baxter, 7 Blackf. 297; French v. Turner, 15 Ind. 59; Crow v. Vance, 4 Iowa, 434; Bank of Indiana v. Anderson, 14 Iowa, 544; Fisher v. Otis, 3 Chand. 83; Andrews v. Hart, 17 Wis. 297; Ord v. McKee, 5 Cal. 575; Willis v. Farley, 24 Cal. 497; Kurtz v. Sponable, 6 Kan. 395. But as a general proposition, such an assignee acquires no legal interest, and can therefore exercise none of the rights of a legal owner, such as the maintenance of an action of ejectment or a writ of entry. Cottrell v. Adams, 2 Biss. 351; Young v. Miller, 6 Gray, 152; Dwinel v. Perley, 32 Me. 197; Edgerton v. Young, 43 Ill. 464; Graham v. Newman, 21 Ala. 497; Partridge v. Partridge, 38 Pa. St. 78; Warden v. Adams, 15 Mass. 232. But in the code States, where all actions are instituted in the name of the party beneficially interested, the equitable assignee may enforce the mortgage in his own name. Gower v. Howe, 20 Ind. 396; Sangston v. Love, 11 Iowa, 580; Rankin v. Major, 9 Iowa, 297; Clearwater v. Rose, 1 Blackf. 138; Paine v. French, 4 Ohio, 320; Garland v. Richeson, 4 Rand. 266; Kurtz v. Sponable, 6 Kan. 395; see also, to the same effect, Kinna v. Smith, 2 Green Ch. 14; Mulford v. Peterson, 35 N. J. Eq. 127; Williams v. Morancy, 3 La. An. 227; Southerin v. Mendum, 5 N. H. 420; Rigney v. Lovejoy, 13 N. H. 247; Austin v. Burbank, 2 Day, 396; Clarksons v. Doddridge, 14 Gratt. 44; Runyan v. Mersereau, 11 Johns. 534. And in those States where the legal title of the mortgage does not pass with the assignment of the debt, equity may compel the holder of the legal title to transfer it to the assignee of the debt, or to maintain the suits necessary for the protection of the assignee. Wolcott v. Winchester, 15 Gray, 461; Crane v. March, 4 Pick. 131; Mount v. Suydam, 4 Sandf. Ch. 399; Lyon's App., 61 Pa. St. 15; Baker v. Terrell, 8 Minn. 195. And where the mortgage is given to secure two or more debts, the assignment of one of them will operate as an assignment of a *pro rata* share in the mortgage, unless it is the expressed intention of the parties that the entire mortgage-security should be retained for the benefit of the remaining debts. Donley v. Hays, 17 Serg. & R. 400; Belding v. Manly, 21 Vt. 550; Miller v. Rutland, etc., R. R., 40 Vt. 39; Keyes v. Woods, 21 Vt. 331; Cooper v. Ulman, Walk. (Mich.) 251; Warden v.

the case in those States where the mortgagee is prohibited from assigning the mortgage without the debt.

§ 331. **Assignment of the mortgagor's interest.** — The mortgagor's interest, whether before or after condition broken, at common law or under the lien theory, can only be assigned by deed, for in any case and under all circumstances the mortgagor is considered, as against all the world except the mortgagee, as the owner of the legal estate, which he can convey as long as his equity of redemption has not been barred or foreclosed.¹ As against the mortgagee, the mortgagor's assignee has merely the rights of the mortgagor

Adams, 15 Mass. 233; *Lane v. Davis*, 225. This is always the case, in the absence of an express contract, where the debts secured by the same mortgage fall due at the same time. But where they fall due at different periods, in very many of the States one has priority over the other in the order in which they fall due. The effect is the same as if there had been successive and independent mortgages for each debt. *Stanley v. Beatty*, 4 Ind. 134; *Hough v. Osborne*, 7 Ind. 140; *McVay v. Bloodgood*, 9 Port. 547; *U. S. Bk. v. Covert*, 13 Ohio, 240; *Wood v. Trask*, 7 Wis. 566; *Preston v. Hodges*, 50 Ill. 56; *Funk v. McReynolds*, 33 Ill. 497; *Mitchell v. Laden*, 36 Mo. 532; *Thompson v. Field*, 38 Mo. 325; *Sangster v. Love*, 11 Iowa, 580; *Reeder v. Carey*, 13 Iowa, 274; *Isett v. Lucas*, 17 Iowa, 506; *G. Wathmeys v. Ragland*, 1 Rand. 466; *Wilson v. Hayward*, 6 Fla. 171; *Hunt v. Styles*, 10 N. H. 466; *Larrabee v. Lambert*, 32 Me. 97; *contra*, *Darby v. Hays*, 17 Serg. & R. 400; *Henderson v. Herrod*, 10 Smed. & M. 631; *English v. Carney*, 25 Mich. 178; *Grattan v. Wiggins*, 23 Cal. 30. But it is always competent for the parties to control the priority of the debts secured by the same mortgage, and may altogether exclude one or more from the enjoyment of the security. *Bryant v. Damon*, 6 Gray, 164; *Langdon v. Keith*, 9 Vt. 299; *Mechanics' Bk. v. Bk. of Niagara*, 9 Wend. 410; *Eastman v. Foster*, 8 Metc. 19; *Stevenson v. Black*, 1 N. J. Eq. 338; *Wright v. Parker*, 2 Aik. 212; *Collum v. Erwin*, 4 Ala. 452; *Walker v. Dement*, 42 Ill. 272; *Bk. of England v. Tarleton*, 23 Miss. 178; *Cooper v. Ulman*, Walk. (Mich.) 251; *Grattan v. Wiggins*, 23 Cal. 30. And it has been held that the mortgage-debts in the hands of assignees will have priority in the order of their assignment. *Eastman v. Foster*, 8 Metc. 19; *Noyes v. White*, 9 Minn. 640; *contra*, *Page v. Pierce*, 26 N. H. 317; *Stevenson v. Black*, 1 N. J. Eq. 338; *Betz v. Heebner*, 1 Penn. 280; *Henderson v. Herrod*, 18 Miss. 631.

¹ *Co. Lit.* 205 a, *Butler's note*, 96; *White v. Whitney*, 3 Metc. 81; *White v. Rittenmyer*, 30 Iowa, 272; *Bigelow v. Wilson*, 1 Pick. 485; *Buchanan v. Monroe*, 22 Texas, 537; *Newall v. Wright*, 3 Mass. 138; *Hodson v. Treat*, 7 Wis. 263.

under the mortgage; he takes the estate subject to the mortgage. And this is the case with a second mortgagee, as well as with an absolute purchaser.¹

§ 332. **Rights and liabilities of assignees.** — In respect to the mortgaged premises, the assignees enjoy all the rights, and assume all the liabilities, of their respective assignors. If the mortgagee is entitled to possession, his assignee will also be entitled to possession; he may appropriate the rents and profits while in possession, and in the same manner as the mortgagee maintain all the actions given for the protection of his interests.² The assignee of the mortgagor, on the other

¹ *Hartley v. Harrison*, 24 N. Y. 170; *Andrews v. Fisk*, 101 Mass. 424; *Flanagan v. Westcott*, 11 N. J. Eq. 264; *Kruse v. Scripps*, 11 Ill. 98; *Frost v. Shaw*, 10 Iowa. 491.

² *Jackson v. Minkler*, 10 Johns. 480; *Jackson v. Bowen*, 7 Cow. 13; *Jackson v. Hopkins*, 18 Johns. 487; *Eastman v. Batchelder*, 36 N. H. 141; *Belding v. Manly*, 21 Vt. 551; *Erskine v. Townsend*, 2 Mass. 493; *Northampton Mills v. Ames*, 8 Metc. 1; *Henshaw v. Wells*, 9 Humph. 568; *Phyfe v. Riley*, 15 Wend. 248; *Strang v. Allen*, 44 Ill. 428; *Barraque v. Manuel*, 7 Ark. 516; *Bolles v. Carli*, 72 Minn. 113; *Whitney v. McKinney*, 7 Johns. Ch. 144; *Miller v. Henderson*, 10 N. J. Eq. 320; *Andrews v. McDaniel*, 68 N. C. 385; *Walker v. Bank of Mobile*, 6 Ala. 452; *McGuffey v. Finley*, 20 Ohio, 474; *Garrett v. Puckett*, 15 Ind. 485; *Green v. Marble*, 37 Iowa, 95; *Phillips v. Bank of Lewiston*, 18 Pa. St. 394. Whether the assignee of the mortgage takes it and the debt subject to all existing equities between the original parties, depends in the first instance upon the nature of the instrument of indebtedness. If it be a bond or any other non-negotiable instrument, the assignee will take both it and the mortgage subject to all the defences, which might be set up against the mortgagee. *Trustees Union College v. Wheeler*, 61 N. Y. 88; *Ingraham v. Disborough*, 47 N. Y. 421; *Davis v. Bechstein*, 69 N. Y. 440; 25 Am. Rep. 218; *Pendleton v. Fay*, 2 Paige Ch. 202; *Ellis v. Messervie*, 11 Paige Ch. 467; s. c., 2 Denio, 640; *Mott v. Clark*, 9 Pa. St. 399; *Twitchell v. McMurtrie*, 77 Pa. St. 383; *Losey v. Simpson*, 10 N. J. Eq. 247; *Musgrove v. Kennell*, 23 N. J. Eq. 75; *Reeves v. Scully*, Walk. (Mich.) 248; *Nicholls v. Lee*, 10 Mich. 526; *Croft v. Bunster*, 9 Wis. 503; *Goulding v. Bunster*, *ib.* 503; *Hortzman v. Gerker*, 49 Pa. St. 282. But if in some of the states the instrument of indebtedness be a negotiable note, the mortgage, being treated as incident to the debt, receives from the note a negotiable character, and passes to the assignee free from the equities existing between the mortgagee and mortgagor, unless by express terms the mortgage is assigned subject to the equities. And to be free from them, the assignment must be made before the debt is due. Car-

hand, has a right to redeem the estate and call the mortgagee to account for the rents and profits received by him while in possession, even though he has permitted the mortgagor to enjoy them after notice of the assignment. For while in possession the mortgagee is trustee as to the rents and profits, not only of the mortgagor, but also of the mortgagor's assignees, and he cannot after notice of the assignment pay them over to the mortgagor. He must apply them to the satisfaction of the mortgaged debt.¹ But although the mortgagor's assignee has a right to redeem the mortgaged premises, he does not by the assignment assume the personal liability of the mortgagor, unless the deed of assignment in express terms imposes such liability upon the assignee as a part of the consideration.² Where there is an

penter v. Longan, 16 Wall. 271; *Kenicott v. Supervisors*, 10 Wall. 452; *Sprague v. Graham*, 29 Me. 160; *Pierce v. Faunce*, 47 Me. 507; *Gould v. Marsh*, 1 Hun, 566; *Jackson v. Blodgett*, 5 Cow. 203; *Green v. Hart*, 1 Johns. 580; *Taylor v. Page*, 6 Allen, 86; *Young v. Miller*, 6 Gray, 152; *Breen v. Seward*, 11 Gray, 118; *Dutton v. Ives*, 2 Mich. 515; *Bloomer v. Henderson*, 8 Mich. 395; *Cornell v. Hichens*, 11 Wis. 353; *Webb v. Haselton*, 4 Neb. 308; 19 Am. Rep. 638. But in other courts, the negotiable character of the note is held not to extend to the mortgage, which secures its payment. And although, so far as the personal liability of the mortgagor on the note is concerned, the assignee takes it free from the equities, the mortgage in his hands is subject to them. *Olds v. Cummings*, 31 Ill. 188; *Sumner v. Waugh*, 56 Ill. 531; *White v. Sutherland*, 64 Ill. 181; *Baily v. Smith*, 14 Ohio St. 396; *Bouligny v. Fortier*, 17 La. An. 121; *Johnson v. Carpenter*, 7 Minn. 176.

¹ *Goodman v. White*, 26 Conn. 317; *Mannisig v. Markel*, 19 Iowa, 104; *Merriam v. Barton*, 14 Vt. 501; *Smith v. Manning*, 9 Mass. 422; *Bell v. Mayor of N. Y.*, 10 Paige Ch. 49; *Kruse v. Scripps*, 11 Ill. 98; *Ruckman v. Astor*, 9 Paige Ch. 517; *Getston v. Thompson*, 29 Md. 595; *Gibson v. Crehore*, 5 Pick. 146; *Gordon v. Lewis*, 2 Sumn. 143.

² *Furnas v. Durgin*, 119 Mass. 500; 20 Am. Rep. 341; *McInteer v. Shaw*, 6 Allen, 85; *Strong v. Converse*, 8 Allen, 559; *Pike v. Goodnow*, 12 Allen, 474; *Braman v. Dowse*, 12 Cush. 227; *Belmont v. Coman*, 22 N. Y. 438; *Vrooman v. Turner*, 69 N. Y. 286; 25 Am. Rep. 195; *Comstock v. Hitt*, 37 Ill. 542; *Johnson v. Morrell*, 13 Iowa, 301; *Aufrecht v. Northrop*, 20 Iowa, 62; *Tichenor v. Dodd*, 4 N. J. Ch. 454. But if a deed only contains a clause to the effect that the conveyance is subject to a mortgage, it will not impose upon the grantee any personal liability for the debt. *Trotter v. Hughes*, 12 N. Y. 74; *Tillotson v. Boyd*, 4 Sandf. Ch. 516; *Weed Sewing Machine Co. v. Emerson*

agreement of that kind, it is clear that the mortgagor may enforce it, and recover of his assignee, if he, the mortgagor, has been compelled to pay the mortgage debt; but how far, and whether if at all, the mortgagee may take advantage of this agreement to which he is not a privy, and sue the assignee upon it, is a question upon which the authorities are not agreed. The better opinion seems to be that, though the mortgagee cannot maintain an action at law upon the covenant for the want of privity between him and the assignee, he will in equity be subrogated to the rights of the mortgagor in the agreement, and can in equity enforce its performance in his own behalf.¹ He could also,

115 Mass. 554; *Fiske v. Tolman*, 124 Mass. 254; 26 Am. Rep. 659; *Baumgardner v. Allen*, 6 Munf. 439; *Hull v. Alexander*, 26 Iowa, 569; *Dunn v. Rodgers*, 43 Ill. 260; *Fowler v. Fay*, 62 Ill. 375. In such a case, the only effect produced is that the grantee cannot impeach the validity of the mortgage. *Ritter v. Phillips*, 53 N. Y. 586; *Green v. Turner*, 38 Iowa, 112; *Perry v. Kearns*, 13 Iowa, 174; *Sweetzer v. Jones*, 35 Vt. 317. But it will not qualify a general covenant against incumbrances, so as to relieve the mortgagor from liability, unless the mortgage is expressly excepted from the operation of the covenant. *Spurr v. Andrew*, 6 Allen, 420; *Estabrook v. Smith*, 6 Gray, 592; *Harlow v. Thomas*, 15 Pick. 66.

¹ *Lawrence v. Fox*, 20 N. Y. 268; *Garnsey v. Rogers*, 47 N. Y. 223; *Klapworth v. Dressler*, 13 N. J. Ch. 62; *Ricard v. Saunderson*, 41 N. Y. 179; *Thorp v. Keokuk Coal Co.*, 48 N. Y. 256; *Campbell v. Smith*, 71 N. Y. 26; 27 Am. Rep. 5; *Crawford v. Edwards*, 33 Mich. 354; *Thompson v. Bertram*, 14 Iowa, 476; *Burr v. Beers*, 24 N. Y. 178; *Corbett v. Waterman*, 11 Iowa, 87; *Wilson v. King*, 23 N. J. 150; *Herbert v. Doussan*, 8 La. An. 267; *Converse v. Cook*, 8 Vt. 61, 64; *Lennig's Estate*, 52 Pa. St. 138; *Fithian v. Monks*, 43 Mo. 520; *contra*, *Mellen v. Whipple*, 1 Gray, 317; *Drury v. Tremont Improvement Co.*, 13 Allen, 168; *Marsh v. Pike*, 10 Paige Ch. 505; s. c., 1 Sandf. Ch. 210; *Morris v. Oakford*, 9 Pa. St. 498; *Carpenter v. Koons*, 20 Pa. St. 222. And the obligation is binding upon the grantee, although he does not sign the deed. By his acceptance of the deed he undertakes to perform all the conditions and obligations incident thereto. *Crawford v. Edwards*, 33 Mich. 354; *Spaulding v. Hallenbeck*, 35 N. Y. 204. *Huyler v. Atwood*, 26 N. J. Eq. 504; *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35. The statement in the text, that the mortgagee cannot maintain an action at law on the purchaser's promise to pay the mortgage-debt, is not in accord with the majority of the decisions. It involves the question whether a stranger can maintain an action on a contract, which was made to another for his benefit; and upon this general question, the authorities are not agreed. The author believes that there is not a sufficient privity

in those States where *choses in action* may be levied upon and sold under execution, pursue that remedy in a court of law.

§ 333. **Effect of payment or tender of payment.**—If payment or tender of payment, by parties having the right to redeem, be made when the debt falls due, it works a complete discharge of the mortgage, divests the mortgagee of all his rights and remits to the mortgagor all his rights at common law, as fully as if there had been no mortgage. And if the mortgagee is in possession, ejectment will lie, and he will be ousted without any formal release or discharge of the mortgage.¹ A formal discharge of the mortgage would, however, be required, if the mortgage contained a clause which provides for a conveyance when the condition is performed.² This will be found to be the general rule in all the States. But where the tender or payment is made after the condition has been broken, the same variance of

of contract to support an action at law upon the promise to pay, unless the contract creates a bailment. If money be given to A. to hand to B., it is a *mandatum*, and B. may recover it from A.; B. is a *quasicestui que trust*. But if A. promises B. to pay a sum of money to C., in satisfaction of a debt owing by A. to B., there is no bailment, and, therefore, no obligation to C. But see the author's article on the subject in 11 Cent. L. J. 161.

¹ Whitcomb v. Simpson, 39 Me. 21; Camp v. Smith, 5 Conn. 80; Erskine v. Townsend, 2 Mass. 495; Holman v. Bailey, 3 Metc. 55; Doody v. Pierce, 9 Allen, 141; Stewart v. Crosby, 50 Me. 130; Currier v. Gale, 9 Allen, 522; Maynard v. Hunt, 5 Pick. 240; Munson v. Munson, 30 Conn. 425. But the payment cannot be enforced by either party before the debt falls due, and the mortgagee may refuse to accept it. But if the debt and interest up to the fixed day of payment be tendered, it will have the same effect upon the mortgage as if tendered on the proper day. Burgoyne v. Spurling, Cro. Car. 283; Brown v. Cole, 14 Sim. 427; Scott v. Frink, 53 Barb. 533; Abbe v. Goodwin, 7 Conn. 377; Hoyle v. Cazabat, 25 La. An. 438. And although nothing but actual payment will extinguish the debt, a simple tender of payment will discharge the mortgage, and prevent a subsequent foreclosure. Co. Lit. 209 b; Martindale v. Smith, 1 Q. B. 389; Willard v. Harvey, 5 N. H. 252; Kortright v. Cady, 21 N. Y. 343; Darling v. Chapman, 14 Mass. 101; Maynard v. Hunt, *supra*; Crain v. McGoon, 86 Ill. 431; 29 Am. Rep. 37.

² See cases cited in preceding note (1)

opinion is encountered as in other branches of the law of mortgages, where the common-law and lien theories conflict. At common law, since the default made the estate absolute in the mortgagee, and left in the mortgagor only the equity of redemption, the mere payment or tender of payment will not revert the legal title in the mortgagor. A formal discharge is requisite, and if the mortgagee refuses to make it, the mortgagor's only remedy is in equity, a proceeding to redeem the property. He cannot maintain an action of ejectment, for he has no legal estate.¹ In those States where the mortgage is regarded as a lien, even after condition broken, a tender of payment as well as payment will operate as a discharge or extinguishment of the mortgage both before and after the default. And if the mortgagee is in possession, an ejectment suit may be instituted against him. The mortgagor is not obliged to resort to equity to obtain a formal cancellation of the mortgage.²

¹ *Smith v. Kelly*, 27 Me. 237; *Stewart v. Crosby*, 50 Me. 130; *Howard v. How*, 3 Metc. 548; *Holman v. Bailey*, *Ib.* 55; *Howe v. Lewis*, 14 Pick. 329; *Grover v. Flye*, 5 Allen, 543; *Pillsbury v. Smyth*, 25 Me. 427; *Dyer v. Toothaker*, 51 Me. 380; *Smith v. Vincent*, 15 Conn. 1; *Phelps v. Sage*, 2 Day, 151; *Cross v. Robinson*, 21 Conn. 379. Technically, this is true. But even in those States, proof of payment or tender of payment will prevent the enforcement of the mortgage against the mortgagor. *Wade v. Howard*, 11 Pick. 289; *Breckenridge v. Brooks*, 2 A. K. Marsh. 337; *Slayton v. McIntire*, 11 Gray, 271; *Gray v. Jenks*, 3 Mason, 520; *Williams v. Thurlow*, 31 Me. 392; *Faulkner v. Breckenbrough*, 4 Rand. 245; *Pike v. Goodnow*, 12 Allen, 472; *Arnot v. Post*, 6 Hill. 65.

² *Jackson v. Stackhouse*, 1 Cow. 122; *Kortright v. Cady*, 21 N. Y. 343; *Farmers' Ins., etc., Co. v. Edwards*, 26 Wend. 541; *Runyan v. Mersereau*, 11 Johns. 538; *Stoddard v. Hart*, 23 N. Y. 556; *Den v. Spinning*, 1 Halst. 471; *Shields v. Lozear*, 34 N. J. L. 496; *Southerin v. Mendum*, 5 N. H. 431; *Swett v. Horn*, 1 N. H. 382; *Rickett v. Madeira*, 1 Rawle, 325; *Thomas' Appeal*, 3 Pa. St. 378; *Paxon v. Paul*, 3 Har. & McH. 399; *Furbish v. Goodwin*, 25 N. H. 425; *Howard v. Gresham*, 27 Ga. 347; *Champney v. Coope*, 32 N. Y. 543; *Ledyard v. Chapin*, 6 Ind. 320; *Griffin v. Lovell*, 42 Miss. 402; *Ryan v. Dunlap*, 17 Ill. 40; *Holt v. Rees*, 44 Ill. 30; *Armitage v. Wickliffe*, 12 B. Mon. 488; *Perkins v. Dibble*, 10 Ohio, 433; *M'Nair v. Picotte*, 33 Mo. 57; *Caruthers v. Humphrey*, 12 Mich. 270; *Schinkel v. Hanewinkle*, 19 La. An. 260; *Ladue v. Detroit, etc., R. R.*, 13 Mich. 396; *Briggs v. Seymour*, 17 Wis. 255;

§ 334. **Who may redeem.** — If the mortgage-debt is actually paid, the payment will, as against the mortgagee, extinguish the mortgage and the mortgagee's rights thereunder, whoever pays the debt. But in order that a tender of payment may have that effect, it must be made by some one who is entitled to redeem. Any one, who has an interest in the mortgaged premises, claiming under the mortgagor, has this right. And this is the case, whether his interest be legal or equitable, an estate or a lien. The only requisite is a privity of estate with the mortgagor. Among such may be enumerated grantees, subsequent incumbrances, whether they be junior mortgagees or judgment-creditors, heirs, devisees, personal representatives, tenants for years, the husband for his curtesy, and the widow for her dower or jointure.¹ But, in order that tender of payment may have the effect of extinguishing the mortgage, the whole debt must be tendered, together with all the interest and costs that have accrued thereon to the date of the tender. Therefore, if the widow, for example, desires to redeem for the preservation of her dower right, she must offer to pay

Fisher v. Otis, 3 Chand. (Wis.) 83; *McMillan v. Richards*, 9 Cal. 365; *Johnson v. Sherman*, 15 Cal. 287; *Crain v. McGoon*, 86 Ill. 431; 29 Am. Rep. 37.

¹ *Lomax v. Bird*, 1 Vern. 182; *Gibson v. Crehore*, 5 Pick. 146; *Grant v. Duane*, 9 Johns. 591; *Ex parte Willard*, 5 Wend. 94; *Averill v. Taylor*, 8 N. Y. 44; *Manning v. Markel*, 19 Iowa, 104; *Boarman v. Catlett*, 13 Smed. & M. 149; *Scott v. Henry*, 13 Ark. 113; *Moore v. Beasom*, 44 N. H. 215; *Merriam v. Barton*, 14 Vt. 501; *Smith v. Manning*, 9 Mass. 422; *Fray v. Drew*, 11 Jur. (N. S.) 130; *Burnett v. Dennistor*, 5 Johns. Ch. 35; *Thompson v. Chandler*, 7 Greenl. 377; *Saunders v. Frost*, 5 Pick. 259; *Bacon v. Bowdoin*, 22 Pick. 401; *Goodman v. White*, 26 Conn. 317; *Newhall v. Savings Bank*, 101 Mass. 431; *Brainard v. Cooper*, 10 N. Y. 356; *Hoyt v. Martense*, 16 N. Y. 231; *Dunlap v. Wilson*, 32 Ill. 517; *Mellish v. Robertson*, 25 Vt. 603; *Rogers v. Myers*, 68 Ill. 92; *Kimmel v. Willard*, 1 Dougl. (Mich.) 217; *Wiley v. Ewing*, 47 Ala. 418; *Calkins v. Munsell*, 2 Root, 333; *Young v. Williams*, 17 Conn. 393; *McLaughlin v. Curts*, 27 Wis. 644; *Hamilton v. Dobbs*, 19 N. J. Eq. 227; *McArthur v. Franklin*, 16 Ohio St. 193; *Hitt v. Holliday*, 2 Litt. 332; *Van Buren v. Olmstead*, 5 Paige Ch. 9; *Stainback v. Geddy*, 1 Dev. & B. Eq. 479; *Chandler v. Dyer*, 37 Vt. 345; *Bridgeport v. Blinn*, 43 Conn. 274; *Kingsbury v. Buckner*, 70 Ill. 514.

the whole debt. The mortgagee can refuse to accept only her share of it. And this is true of any one who owns only a portion of the mortgaged premises.¹

§ 335. **What acts extinguish the mortgage.** — No acts, which do not amount to a payment of the debt or a release of the mortgage, will cause an extinguishment of the mortgage. A mere change in the form of the debt—as the substitution of a bond for a note, or the execution of a new note in the place of the old one—will not have that effect, unless such substitution or change is made with the intention that the new instrument of indebtedness shall be accepted as an actual payment of the old debt. And this has been held to be the case where a note for a smaller amount had been substituted. When and how the intention of payment can be shown in such a case is a very difficult matter to explain by any concise and comprehensive statement. It depends upon the facts of each case, and is itself a question of fact, whether the person making the change intended it to operate as a satisfaction of the old debt.²

¹ *McCabe v. Bellows*, 7 Gray, 148; *McCabe v. Swap*, 14 Allen, 191; *Gibson v. Crehore*, 5 Pick. 146; *Smith v. Kelly*, 27 Me. 237; *Chittenden v. Barney*, 5 Vt. 28; *Bell v. Mayor, etc.*, 10 Paige Ch. 49; *Fletcher v. Chase*, 16 N. H. 42; *Norris v. Moulton*, 34 N. H. 392; *Downer v. Wilson*, 33 Vt. 1; *Seymour v. Davis*, 35 Conn. 264; *Mullanphy v. Simpson*, 4 Mo. 319; *Douglass v. Bishop*, 27 Iowa, 216; *Gliddon v. Andrew*, 14 Ala. 733; *Knowles v. Rablin*, 20 Iowa, 101; *Lamb v. Montague*, 112 Mass. 352; *Franklin v. Gorham*, 2 Day, 142.

² *Parkhurst v. Cummings*, 56 Me. 159; *Dana v. Binney*, 7 Vt. 493; *Davis v. Maynard*, 9 Mass. 242; *Fowler v. Bush*, 21 Pick. 230; *Baxter v. McIntire*, 13 Gray, 168; *Grafton Bk. v. Foster*, 11 Gray, 265; *Elliott v. Sleeper*, 2 N. H. 525; *Mitchell v. Clark*, 35 Vt. 104; *Pond v. Clark*, 14 Conn. 334; *Boxheimer v. Gunn*, 24 Mich. 376; *Dunshee v. Parmelee*, 19 Vt. 172; *Hadlock v. Bullfinch*, 31 Me. 246; *Markell v. Eichelberger*, 12 Md. 78; *Euston v. Friday*, 2 Rich. Eq. 427; *Bank v. Rose*, 1 Strobb. Eq. 257; *Brinckerhoff v. Lansing*, 4 Johns. Ch. 65; *Barker v. Bell*, 37 Ala. 359; *Vogle v. Ripper*, 34 Ill. 106; *Cleveland v. Martin*, 2 Head, 128; *Gault v. McGrath*, 32 Pa. St. 392; *Rogers v. Traders' Ins. Co.*, 6 Paige Ch. 583; *Applegate v. Mason*, 13 Ind. 75; *Williams v. Starr*, 5 Wis. 548; *Jordan v. Smith*, 30 Ohio, 500; *Dillon v. Byrare*, 5 Cal. 455.

§ 336. **The effect of a discharge.** — Where the mortgage is discharged by the mortgagor's payment of the debt, it is extinguished altogether; particularly, where there are junior incumbrancers. The mortgagor cannot keep it alive, even though he goes through the formality of an assignment. A merger results from the union of the two interests in one person.¹ It has, however, been held that if there are no junior incumbrancers, a satisfied mortgage may be revived, and be made a good and effectual security for a new debt between new parties. But the position is not without doubt as to its soundness.² If the mortgage has been delivered up and cancelled through fraud, accident or mistake, the court of equity will revive it and enforce it, at least against the mortgagor and all parties claiming under him, who have notice of the equity. And a subsequent purchaser will be bound by the equity if the mortgage has not been satisfied on the records; for he is compelled to take notice of that fact, and it is sufficient to put him on his inquiry.³

¹ *Wadsworth v. Williams*, 100 Mass. 126; *Strong v. Converse*, 8 Allen, 559; *Wade v. Beldmeir*, 40 Mo. 486; *McGiven v. Wheelock*, 7 Barb. 22; *Mead v. York*, 6 N. Y. 449; *Thomas' Appeal*, 30 Pa. St. 378; *Richard v. Talbird*, Rich. Ch. 158; *Swift v. Kraemer*, 13 Cal. 526; *Ledyard v. Chapin*, 6 Ind. 320; *Pelton v. Knapp*, 21 Wis. 63; *Robinson v. Urquhart*, 12 N. J. Eq. 515; *Peckham v. Haddock*, 36 Ill. 38; *Fewell v. Kessler*, 30 Ind. 195; *Perkins v. Steame*, 23 Texas, 561; *Brown v. Lapham*, 3 Cush. 554; *Gardner v. James*, 7 R. I. 396; *Champney v. Coope*, 32 N. Y. 543; *Bowman v. Manter*, 33 N. H. 530; *Large v. VanDoren*, 14 N. J. Eq. 208; *Carlton v. Jackson*, 12 Mass. 592.

² *Marvin v. Vedder*, 5 Cow. 671; *Beardsley v. Tuttle*, 11 Wis. 74; *Walker v. Snediker*, 1 Hoffm. Ch. 145; *Star v. Ellis*, 6 Johns. Ch. 392; *Whiting v. Beebe*, 12 Ark. 428; *Johnson v. Anderson*, 30 Ark. 745; *Hurser v. Anderson*, 4 Edw. Ch. 17; *International Bk. v. Bowen*, 80 Ill. 541; *Jordan v. Furlong*, 19 Ohio St. 89. And it seems the objection to this principle is greatly lessened, if not altogether removed, if the assignment is made at the mortgagor's request to a third person. Although lifeless in this third person's hands, it will be a good and binding security when assigned to a new creditor upon a new or different consideration. *Bolles v. Wade*, 4 N. J. Eq. 458; *Sheddy v. Gervan*, 113 Mass. 378; *Hoy v. Bramhall*, 11 N. J. Eq. 563; *Goulding v. Bunster*, 9 Wis. 513.

³ *Grimes v. Kimball*, 3 Allen, 578; *Joslyn v. Wyman*, 5 Allen, 63; *Howe v. Wilder*, 11 Gray, 267; *Lawrence v. Stratton*, 6 Cush. 163; *Stover v. Wood*,

§ 337. **When payment will work an assignment.** — Payment of the debt by the mortgagor, as has been explained, always discharges the mortgage, though the satisfaction by the mortgagee be in form an assignment to himself or to one in trust for him.¹ And where the debt is paid by a volunteer — a stranger who is not interested in the mortgaged premises — the mortgage will be discharged and extinguished, unless an assignment has actually been made to him. He cannot set up the claim to an equitable assignment, although he may have paid the debt at the mortgagor's request.² But when the payment is made by one who is not under a primary personal obligation to pay, who is secondarily liable as surety or indorser, or who has an interest in the mortgaged property, and, consequently, a right to redeem, payment does not always operate as a discharge. And the question is not determined so much by the form of the acknowledgment of payment as the intention of the party paying. That intention may be derived from the facts connected with the transaction and established by parol evidence. And where it is, beyond a doubt, to the interest of the one paying that the mortgage should be kept alive, equity will look upon the transaction as an assignment and not a discharge. Especially is this the case where the per-

26 N. J. Eq. 417; *Fassett v. Smith*, 23 N. Y. 252; *Middlesex v. Thomas*, 20 N. J. Eq. 39; *Weir v. Mosher*, 19 Wis. 311; *Vannice v. Bergen*, 16 Iowa, 555; *De Yampert v. Brown*, 23 Ark. 166; *Stanley v. Valentine*, 79 Ill. 544; *Mallet v. Page*, 8 Ind. 364; *Robinson v. Sampson*, 23 Me. 388. And such relief will also be afforded where the mortgage has been satisfied, instead of being assigned. *Dudley v. Bergen*, 23 N. J. Eq. 397; *Champlin v. Laytin*, 18 Wend. 407; *Russell v. Mixer*, 42 Cal. 475; *Bruce v. Bonney*, 12 Gray, 107. But it must be a mistake of fact. If the satisfaction is obtained through a mistake of law, no relief will be granted, unless from the tender age or weak mind of the person injured, the charge of undue influence may be established. *Peters v. Florence*, 38 Pa. St. 194; *Hampton v. Nicholson*, 23 N. J. Eq. 423; *Bentley v. Whittlemore*, 1 *Ib.* 366; *Smith v. Smith*, 15 N. H. 55.

¹ See *ante*, sects. 333, 336.

² *Downer v. Wilson*, 33 Vt. 1. See *Guy v. De Upsey*, 16 Cal. 195.

son paying has only a part interest in the premises, or is a surety, and by paying becomes entitled to contribution or satisfaction from the mortgagor and others interested in the property. Payment in such cases never works a discharge; the mortgage survives, and may afterwards be enforced against all parties affected with notice.¹

§ 338. **Registry of mortgages, and herein of priority.** — It is a general rule in this country that if a mortgage is duly registered in the recorder's office, the record will be constructive notice of the mortgage to all subsequent purchasers and incumbrancers, and gives to it a priority over such subsequently acquired interests.² But the record is only notice of the mortgage as recorded; and if there is an error in the registration, as, for example, showing the mortgage to be security for a less amount, it has priority over subsequent purchasers for the amount recorded, and not for the actual amount expressed in the mortgage. The purchaser is not

¹ *Hinds v. Ballou*, 44 N. H. 619; *Stantons v. Thompson*, 49 N. H. 272; *Butler v. Seward*, 10 Allen, 466; *Mickles v. Townsend*, 18 N. Y. 575; *Leavitt v. Pratt*, 53 Me. 14; *Kellogg v. Ames*, 41 N. Y. 259; *Abbott v. Kasson*, 72 Pa. St. 185; *Walker v. King*, 44 Vt. 601; *Wadsworth v. Williams*, 100 Mass. 126; *Wade v. Baldmier*, 40 Mo. 486; *Champlin v. Laytin*, 18 Wend. 407; *Skillman v. Teeple*, 1 N. J. Eq. 232; *Dudley v. Bergen*, 23 N. J. Eq. 397; *Russell v. Mixer*, 42 Cal. 475; *Baker v. Flood*, 103 Mass. 47. And payment by a purchaser of the equity of redemption will not operate in equity as an extinguishment of the mortgage, as against the mortgagor, sureties and junior incumbrancers, although the mortgage is formally satisfied and cancelled, unless he has become primarily liable by his assumption of the payment of the mortgage, as the consideration of the conveyance to him. *Savage v. Hall*, 12 Gray, 363; *Pitts v. Aldrich*, 11 Allen, 39; *Abbott v. Kasson*, 72 Pa. St. 183; *Pool v. Hathaway*, 22 Me. 85; *Hatch v. Kimball*, 16 Ib. 143; *Skeel v. Spraker*, 8 Paige Ch. 182; *Millspaugh v. McBride*, 7 Paige Ch. 509; *Shin v. Fredericks*, 56 Ill. 443; *Mobile Branch Bank v. Hunt*, 8 Ala. 876; *Lyon v. McIlvaine*, 24 Iowa, 12; *Fitch v. Cotheal*, 2 Sandf. Ch. 29; *Lilly v. Palmer*, 51 Ill. 331; *Mickels v. Townsend*, 18 N. Y. 575; *Frey v. Vanderhoof*, 15 Wis. 397. But in law, an actual formal assignment is required to keep the mortgage alive. *Den v. Dimon*, 10 N. J. L. 156; *Kinna v. Smith*, 17 N. J. Eq. 14; *Wade v. Howard*, 11 Pick. 289.

² See *post*, sects. 814-816, where the recording law is discussed generally.

required by the registry laws to inspect the original deeds, for he is permitted to presume that the record is a correct copy. So, also, if a mortgage appears on the record, through an error in registration, to be invalid from defective execution, the investigator of titles is not required to go behind the registry and inquire into the cause of the invalidity; nor is he affected by such a record with notice of the equities which might arise out of the irregular deed between the parties to the same.¹ The registration must also comply with the essential requirements of the registry laws, in order to raise a constructive notice of the mortgage. What constitutes a proper record is the same in most of the States, whether the deed be a mortgage or an absolute conveyance. The subject, therefore, will be more clearly elucidated under the head of titles to real property.²

§ 339. Rule of priority from registry, its force and effect. — But, notwithstanding the registry laws provide for the recording of mortgages like other deeds, the general rule is that an unrecorded mortgage is still good between the parties themselves, and all other persons claiming under them, without a valuable consideration, or with notice of the

¹ *Russell v. Shields*, 11 Ga. 636; *Dewitt v. Moulton*, 17 Me. 418; *Frost v. Beekman*, 1 Johns. Ch. 288; *s. c.*, 18 Johns. 544; *Peck v. Mallams*, 10 N. Y. 509; *Johns v. Scott*, 5 Md. 81; *Taylor v. Hotchkiss*, 2 La. An. 917; *Barrett v. Shaubhut*, 5 Minn. 323; *Terrell v. Andrew Co.*, 44 Mo. 309; *Farmers' Bk. v. Bronson*, 14 Mich. 369. A different rule is held in other States, under the peculiar phraseology of their statutes of registration. *Brooke's Appeal*, 64 Pa. St. 127; *Wood's Appeal*, 82 Pa. St. 116; *Tousley v. Tousley*, 5 Ohio St. 78; *Mims v. Mims*, 35 Ala. 23; *Merrick v. Wallace*, 19 Ill. 486. But the index is not a part of the record, and an error appearing therein will not prejudice the rights of the mortgagee. It is not even necessary for the mortgage to be indexed. *Curtis v. Lyman*, 24 Vt. 338; *Dodge v. Potter*, 18 Barb. 193; *Mutual Life Ins. Co. v. Dake*, 1 Abb. N. C. 381; *Green v. Garrington*, 16 Ohio St. 548; *Throckmorton v. Price*, 28 Texas, 605; *Bishop v. Schneider*, 46 Mo. 472; 2 Am. Rep. 533; *Shell v. Stein*, 76 Pa. St. 398; 18 Am. Rep. 416; *contra*, *Gwyn v. Turner*, 18 Iowa, 1; *Walley v. Small*, 25 Iowa, 184; *Pringle v. Dunn*, 37 Wis. 449; 19 Am. Rep. 772.

² See *post*, sects. 814-816.

mortgage.¹ If the subsequent purchase is for value and without notice, the recorded deed has the priority over the unrecorded mortgage. And a recorded mortgage has been held to take precedence to a prior unrecorded mortgage, even though the mortgage-debt of the former was incurred at a time anterior to the execution of the latter mortgage.²

¹ And the rule is the same if the mortgage has been defectively executed. *Nice's Appeal*, 54 Pa. St. 200; *Boyce v. Shiver*, 3 S. C. 515; *Phillips v. Pearson*, 27 Md. 242; *Raconillet v. Sansevain*, 32 Cal. 376; *Bibb v. Baker*, 17 B. Mon. 292; *Dorow v. Kelly*, 2 Dall. 142; *Copeland v. Copeland*, 28 Me. 525; *Sparks v. State Bank*, 7 Blackf. 469; *Harris v. Norton*, 16 Barb. 264; *Leggett v. Bullock*, Busb. L. 283; *Woodworth v. Guzman*, 1 Cal. 203; *Dearing v. Watkins*, 16 Ala. 20; *Bell v. Thomas*, 2 Iowa, 384; *Wyatt v. Stewart*, 34 Ala. 716; *contra*, *White v. Deuman*, 1 Ohio St. 110; *Henderson v. McGee*, 6 Heisk. 55. But see *post*, sect. 815.

² *Taylor v. Thomas*, 5 N. J. Eq. 331; *Grant v. Bissett*, 1 Caines's Cas. 112; *Doe v. Bank of Cleveland*, 3 McLean, 140; *Barrett v. Shaubhut*, 5 Minn. 323; *Burke v. Allen*, 3 Yeates, 351; *Holbrook v. Dickenson*, 56 Ill. 497; *Hodgen v. Guttery*, 58 Ill. 431; *Pomet v. Scranton*, 1 Miss. 406; *Harrington v. Allen*, 48 Miss. 493; *Ohio Life Ins. Co. v. Ledyard*, 8 Ala. 866; *Reychaud v. Citizens' Bank*, 21 La. An. 262; *Routh v. Spencer*, 38 Ind. 393; *Tice v. Annin*, 2 Johns. Ch. 125; *Vanderkemp v. Shelton*, 11 Paige, 28; *Buchanan v. International Bank*, 78 Ill. 500; *Tripe v. Marcy*, 39 N. H. 439; *Mathews v. Aiken*, 1 N. Y. 595. Though the record be destroyed, the priority gained by registration will not be affected thereby, if it can be established by other evidence. *Alvis v. Morrison*, 61 Ill. 181; 14 Am. Rep. 354; *Steele v. Boone*, 75 Ill. 457; *Alston v. Alston*, 4 S. C. 116. The parties may also by agreement change the order of priority, and give to a subsequently recorded deed priority over one already recorded, but the agreement will only bind the parties and their privies with notice. *Gillig v. Maass*, 28 N. Y. 191; *Rhoades v. Canfield*, 8 Paige Ch. 545; *Freeman v. Schroeder*, 43 Barb. 618; *Conover v. Van Mater*, 18 N. J. L. 481; *State Bank v. Campbell*, 2 Rich. Eq. 179; *Clason v. Shepherd*, 6 Wis. 369; *Sparks v. State Bank*, 7 Blackf. 469. But where two mortgages are executed and recorded simultaneously, they are concurrent liens on the property. *Stafford v. Van Rensselaer*, 9 Cow. 316; *Gausen v. Tomlinson*, 23 N. J. Eq. 405. And where they are executed simultaneously, and by the understanding of the parties, express or implied, one is not to have priority, an earlier record of one will give it priority over the other. *Daggett v. Rankin*, 31 Cal. 327; *Howard v. Chase*, 104 Mass. 249. But if one of the mortgages is for the purchase-money, it will have priority over one for some other debt, although they are simultaneously recorded. *Clark v. Brown*, 3 Allen, 509; *Turk v. Funk*, 68 Mo. 18; 30 Am. Rep. 771. If both are for purchase-money, they will be concurrent liens. *Jones v. Phelps*, 2 Barb. Ch. 440; *Pomeroy v. Layting*, 15 Gray, 435.

Whether a mortgage unrecorded will be postponed to the lien of a judgment docketed subsequently has been decided differently in different States. In some of the States the judgment is invariably given priority,¹ while in others the unrecorded mortgage will take precedence, unless the mortgaged property has been levied upon in execution of the judgment and sold to a purchaser for value.² If there is any doubt as to the priority of the judgment in such a case, the true rule would seem to require the question to depend upon the priority in execution of the debts, represented respectively by the mortgage and the judgment. If the judgment debt was incurred subsequently to the execution of the mortgage, the judgment when docketed should have priority over the unrecorded mortgage, for the judgment-creditor, in entering into the contract which caused the debt, may have relied upon the apparently unincumbered condition of the debtor's property.

§ 340. **Registry of assignments of mortgages and equities of redemption.** — Since the registration of a deed is constructive notice only to *subsequent* purchasers and incumbrancers, the recording of an assignment of the mortgage, although a protection against other assignees and purchasers

¹ *Semple v. Bird*, 7 Serg. & R. 290; *Friedley v. Hamilton*, 17 Serg. & R. 70; *Uhlin v. Hutchinson*, 23 Pa. St. 110; *Davidson v. Cowan*, 1 Dev. Eq. 470; *Van Thorniley v. Peters*, 26 Ohio St. 471; *Barker v. Bell*, 37 Ala. 354; *Reichert v. McClure*, 23 Ill. 516; *Moore v. Watson*, 1 Root, 388; *Smith v. Jordan*, 25 Ga. 687. But if the judgment-creditor has notice of the prior unrecorded mortgage, the mortgage will of course take precedence to the judgment. *Wertz's Appeal*, 65 Pa. St. 306; *Britton's Appeal*, 45 Pa. St. 172; *Williams v. Tatnall*, 29 Ill. 553.

² *Finch v. Winchelsea*, 1 P. Wms. 278; *Burn v. Burn*, 3 Ves. 582; *Schmidt v. Hoyt*, 1 Edw. Ch. 652; *Jackson v. Dubois*, 4 Johns. 216; *Knell v. Green St. Building Ass'n*, 34 Md. 67; *Hackett v. Callender*, 32 Vt. 97; *Hampton v. Levy*, 1 McCord Ch. 107 (but see *Miles v. King*, 5 S. C. 146); *Righter v. Forrester*, 1 Bush, 278; *Morton v. Robards*, 4 Dana, 258; *Orth v. Jennings*, 8 Blackf. 420; *Kelly v. Mills*, 41 Miss. 267; *Norton v. Williams*, 9 Iowa, 529; *Greenleaf v. Edes*, 2 Minn. 264; *First Nat. Bank v. Hayzlett*, 40 Iowa, 659; *Pixley v. Huggins*, 15 Cal. 127.

from the mortgagee, is no notice to the mortgagor and his assigns. In order not to be bound by the acts of the mortgagee after the assignment, which have the effect of extinguishing the mortgage — as, for example, acceptance of payment from the mortgagor — actual notice of the assignment must be brought to the mortgagor and subsequent purchasers of his equity of redemption.¹ So, also, must actual notice be given to the mortgagee of the assignment of the mortgagor's estate, in order that the rights of the assignee may be fully protected against the unlawful acts of the mortgagor.²

§ 341. **Tacking of mortgages.** — In England, if there are three or more mortgages upon the same property, and the first and third or other subsequent mortgages are held by the same person, with the intervening second mortgage outstanding in another, by obtaining possession under the first mortgage the mortgagee may hold the mortgaged premises against the second mortgagee, until the third or other subsequent mortgage in his possession has been satisfied. This doctrine is called “the tacking of mortgages,” and is based upon the theory that, since one mortgagee has no notice of the other mortgages, the equities of successive junior mortgagees are equal; and the first mortgagee, having the full legal title in possession, may use his possession for the benefit of whatever liens he may have upon the premises to the exclusion of other subsequent mortgagees; who would

¹ *Jones v. Gibbons*, 9 Ves. 410; *Mitchell v. Burnham*, 44 Me. 302; *James v. Johnson*, 6 Johns. Ch. 417; *Walcott v. Sullivan*, 1 Edw. Ch. 399; *Ely v. Scofield*, 35 Barb. 330; *Belden v. Meeker*, 47 N. Y. 307; *Bank v. Anderson*, 14 Iowa, 544; *Johnson v. Carpenter*, 7 Minn. 176. In some of the States notably California, Indiana, Kansas, Michigan, Minnesota, Nebraska, New York, Oregon, Wisconsin, Maryland, the same rule is established by statute. *Jones on Mort.*, sect. 473; 2 Washb. on Real Prop. 148. And see *post*, sect. 815.

² 4 Kent's Com. 174; *Stuyvesant v. Hall*, 2 Barb. Ch. 158; *Bell v. Fleming*, 12 N. J. Eq. 16; *Blair v. Ward*, 10 N. J. Eq. 126. See *post*, sect. 815.

otherwise have taken subject only to the first mortgage.¹ But in this country the general prevalence of recording laws has taken from the doctrine its practical value, since the record is constructive notice to all subsequent incumbrancers, and such notice destroys the equality of the equities said to exist between junior mortgagees. It may be said that the doctrine does not prevail at all in the United States.²

§ 342. **Priority in mortgages for future advances.** — Where the first recorded mortgage is to secure future advances, it becomes a question of importance to what extent will such a mortgage have priority over a subsequently recorded mortgage; and, although there was at one time a considerable diversity of opinion, the general rule now prevailing seems to be the following: If the mortgagee has entered into a binding contract to furnish the advances under all circumstances, and his failure to do so would expose him to an action on the covenant, even if such refusal or failure occurred after the execution of the second mortgage, then his mortgage will take precedence to the second mortgage for the amounts advanced both before and after the execu-

¹ *Young v. Young*, L. R. 3 Eq. 805; *Marsh v. Lee*, 2 Vent. 337; *s. c.*, 1 Ch. Cas. 162; *Brace v. Marlborough*, 2 P. Wms. 491.

² *Grant v. Bissett*, 1 Caines's Cas. 112; *McKinstry v. Merwin*, 3 Johns. Ch. 466; *Burnett v. Denniston*, 5 Johns. Ch. 35; *Thompson v. Chandler*, 1 Me. 381; *Chandler v. Dyer*, 37 Vt. 345; *Osborn v. Carr*, 12 Conn. 195; *Loring v. Cooke*, 3 Pick. 48; *Green v. Tanner*, 8 Metc. 411; *Anderson v. Neff*, 11 Serg. & R. 208; *Thomas' App.*, 30 Pa. St. 378; *Brigden v. Carhart*, 1 Hopk. Ch. 231; *Averill v. Guthrie*, 8 Dana, 82; *Brazee v. Lancaster Bk.*, 14 Ohio, 318; *Wing v. McDowell*, Walk. (Mich.) 175. But it has been held in a number of the courts, that, as between mortgagor and mortgagee, the mortgagee may hold the mortgage and refuse a satisfaction, until all subsequent advances made by the mortgagee shall have been paid. *Orvis v. Newell*, 17 Conn. 97; *Chase v. McDonald*, 7 Har. & J. 160; *Lea v. Stone*, 5 Gill & J. 611; *Joslyn v. Wyman*, 5 Allen, 62; *Stone v. Lane*, 10 Allen, 74; *Siter v. McClanachan*, 2 Gratt. 280; *Colquhoun v. Atkinson*, 6 Munf. 550; *Walling v. Aiken*, 1 McMull. Eq. 1; *Hughes v. Worley*, 1 Bibb. 200; *Downing v. Palmeteer*, 1 B. Mon. 64; *Towner v. Wells*, 8 Ohio, 136; *Coombs v. Jordan*, 3 Bland, 284.

tion of the latter.¹ But if the continuance of the advances be voluntary, and his refusal to make them after the second mortgage would not constitute a breach of the covenant, the first mortgage will have priority only for such amounts as have been advanced before the first mortgagee received notice of the second mortgage.² It has also been a much discussed question whether the registration of the second mortgage is such constructive notice to the first mortgagee as to prevent him from claiming priority for advances made after the recording, and before the receipt of actual notice. In Ohio, Pennsylvania and Michigan it is held that the recording of the second mortgage is constructive notice to the first mortgagee (in a mortgage for future advances), and Mr. Redfield, the late chief justice of the Supreme Court of Vermont, has expressed the opinion that such will finally be the prevailing rule in this country.³ But this view is certainly in conflict, not only with the other English and American decisions on this particular question, but also with the general theory of the effect of recording a deed. It has been explained that the registry is notice only to those who *subsequently* acquire interests in the same property, and un-

¹ *Ladue v. Detroit, etc.*, R. R., 13 Mich. 380; *Griffin v. Burnett*, 4 Edw. Ch. 673; *Crane v. Deming*, 7 Conn. 387; *Boswell v. Goodwin*, 31 Conn. 74; *s. c.*, 12 Am. Law Reg. 79, note; *Rowan v. Sharpe, etc.*, Mfg. Co., 29 Conn. 329; *Moroney's Appeal*, 24 Pa. St. 372; *Lyle v. Ducomb*, 5 Binn. 585; *Hopkinson v. Rolt*, H. L. Cas. 9514; *Nelson v. Iowa, etc.*, R. R., 8 Am. R. R. Rep. 82.

² *Boswell v. Goodwin*, 31 Conn. 74; *Ladue v. Detroit, etc.*, R. R., 13 Mich. 380; *Shaw v. Neale*, 6 H. L. Cas. 597; *Hopkinson v. Rolt*, 9 H. L. Cas. 514; *Robinson v. Williams*, 22 N. Y. 380; *Brinkerhoff v. Marvin*, 5 Johns. Ch. 320; *Bell v. Fleming*, 12 N. J. Eq. 1, 16; *Bk. of Montgomery Co.'s Appeal*, 36 Pa. St. 172; *Cox v. Hoxie*, 115 Mass. 120; *Frye v. Bk. of Ill.*, 11 Ill. 367; *contra*, *Wilson v. Russell*, 19 Md. 494; *Witezinski v. Everman*, 51 Miss. 841, which hold that any mortgage for future advances will be good against subsequent purchasers, as to advances made after the second conveyance, whether the mortgagee is bound to make them or not.

³ *Bk. of Montgomery Co.'s Appeal*, 36 Pa. St. 170; *Parmentier v. Gillespie*, 9 Pa. St. 86; 12 Am. Law Reg. 92, Judge Redfield's note to *Boswell v. Goodwin, s. c.*, 31 Conn. 74; *Spader v. Lawler*, 17 Ohio, 371; *Ladue v. Detroit, etc.*, R. R., 13 Mich. 380.

less strong grounds are shown for making an exception in this case to the general rule, we must hold, with the majority of the American and English courts, that actual notice must be brought home to the first mortgagee, in order to give to the second mortgage priority over the advances made afterwards under the first.¹

¹ *McDaniels v. Colvin*, 16 Vt. 300; *Bell v. Fleming*, 12 N. J. Eq. 1; *Craig v. Toppin*, 2 Sandf. Ch. 78; *Ward v. Cooke*, 17 N. J. Eq. 93; *Truescott v. King*, 6 N. Y. 166; *Robinson v. Williams*, 22 N. Y. 380; *Rowan v. Sharpe's Rifle Co.*, 29 Conn. 329; *Wilson v. Russell*, 13 Md. 495; *Collins v. Carlile*, 13 Ill. 254; *Frye v. Bk. of Ill.*, 11 Ill. 367; *Nelson v. Boyce*, 7 J. J. Marsh. 401; *Jones on Mort.*, sect. 372.

SECTION III.

REMEDIES AND REMEDIAL RIGHTS INCIDENT TO MORTGAGES.

SECTION 351. Actions for waste.

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§ 351. **Actions for waste.** — If the party in possession — whether mortgagor or mortgagee, or their respective assignees — does anything in respect to the mortgage property which constitutes waste, and as such essentially impairs the value of the inheritance, he will be responsible in damage to the other parties who are interested in the property. The action is not the technical legal action, but is one in the

nature of waste, and in the code pleading would be simply an action for damages.¹ But the most effective remedy for the prevention of waste by the parties to a mortgage is a bill in equity for an injunction, or the appointment of a receiver to take charge of the mortgage property. Any one who has an interest, either in the mortgaged premises or in the mortgage debt, may avail himself of these remedies.²

§ 352. **Process to redeem.** — In those States where the payment or tender of payment after condition broken extinguishes the mortgage, and enables the mortgagor to recover the possession by an action of ejectment, no further process is needed to restore him to the complete title in the

¹ *Stowell v. Pike*, 2 Greenl. 387; *Smith v. Goodwin*, *Id.* 173; *Frothingham v. McKusick*, 24 Me. 403; *Hagar v. Brainard*, 44 Vt. 302; *Sanders v. Reed*, 12 N. H. 558; *Burnside v. Twitchell*, 43 N. H. 390; *Mayo v. Fletcher*, 14 Pick. 525; *Wilmarth v. Bancroft*, 10 Allen, 348; *Page v. Robinson*, 10 Cush. 99; *Waterman v. Matteson*, 4 R. I. 539; *Mitchell v. Bogan*, 11 Rich. Eq. 686; *Lane v. Hitchcock*, 14 Johns. 205; *Haskin v. Woodward*, 45 Pa. St. 44; *Van Pett v. McGraw*, 4 Comst. 110; *Gardner v. Heatt*, 3 Denio, 232; *Barnett v. Nelson*, 54 Iowa, 41; 37 Am. Rep. 183. And after condition broken, in the common-law States, the mortgagee may have trover or replevin for the timber cut by the mortgagor, against the purchaser of the mortgagor, as well as against the mortgagor himself. *Langdon v. Paul*, 22 Vt. 205; *Gore v. Jennison*, 19 Me. 53; *Watermann v. Matteson*, 4 R. I. 539; *Frothingham v. McKusick*, 24 Me. 403; *Adams v. Corrison*, 7 Minn. 456; *Kennerly v. Burgess*, 38 Mo. 440; *Kimball v. Lewiston, etc., Co.*, 55 Me. 494; *contra*, *Peterson v. Clark*, 14 Johns. 205; *Wilson v. Malthy*, 59 N. Y. 126; *Cooper v. Davis*, 15 Conn. 556; *Clark v. Reyburn*, 1 Kan. 281.

² *Brady v. Waldron*, 2 Johns. 148; *Johnson v. White*, 11 Barb. 194; *Cooper v. Davis*, 15 Conn. 556; *Salmon v. Claggett*, 3 Bland Ch. 126; *Capner v. Farmington Co.*, 2 Green Ch. 467; *Brick v. Getsinger*, 1 Halst. Ch. 391; *Ensign v. Colburn*, 11 Paige, 503; *Scott v. Wharton*, 2 Hen. & M. 25; *Parsons v. Hughes*, 12 Md. 1; *Gray v. Baldwin*, 8 Blackf. 164; *McCaslin v. The State*, 44 Ind. 151; *Nelson v. Pinegar*, 30 Ill. 473; *Mooney v. Brinkley*, 17 Ark. 340; *Morrison v. Buckner*, Hempst. 442; *Adams v. Corrison*, 7 Minn. 456; *Bunker v. Locke*, 15 Wis. 635; *Fairbank v. Cudworth*, 33 Wis. 358; *Robinson v. Russell*, 24 Cal. 467; *Hampton v. Hodges*, 8 Ves. 105; *Robinson v. Litton*, 3 Atk. 210; *Goodman v. Kine*, 8 Beav. 379. But the mortgagee is under no obligation to enjoin, or bring action for waste, and a subsequent incumbrancer or purchaser cannot hold him liable for failing thus to protect the inheritance, and reduce the debt. *Knarr v. Conaway*, 42 Ind. 260.

land. But where payment or tender does not have that effect — as is the case under the common-law theory — the mortgagor is obliged to resort to a bill in equity to enforce a redemption and cancellation of the mortgage. This equitable remedy may be instituted by the mortgagor or any one claiming under him. The bill must be accompanied with a tender of payment into court, and the decree orders the mortgagee to cancel and deliver up the mortgage and the instrument of indebtedness.¹ Where there are several parties before the court claiming the right to redeem, the court will grant the right of redemption to them in the order of their priority, the one who is last in point of priority being required to redeem all the preceding mortgages, in order that he may acquire the first lien or absolute title.² All persons who are interested in the mortgage, either as privies of the mortgagor or mortgagee, are proper parties to an action for redemption. The mortgagee and his assigns are necessary parties. And where there are several parcels of land covered by the mortgage, and the owner of the equity of one wishes to redeem, the owners of the other parcels must be made parties. But this rule does not apply where there are separate mortgages over each for the same debt.³

¹ *Beekman v. Frost*, 18 Johns. 544; *Silsbee v. Smith*, 41 How. Pr. 418; *Barton v. May*, 3 Sandf. Ch. 450; *Perry v. Carr*, 41 N. H. 371; *Edgerton v. McRea*, 6 Miss. 183; *Daughdrill v. Sweeny*, 41 Ala. 310; *Anson v. Anson*, 20 Iowa, 55; *Pitman v. Thornton*, 66 Me. 469; *Gerrish v. Black*, 122 Mass. 76; *Halt v. Rees*, 46 Ill. 181; *Brobst v. Brock*, 10 Wall. 536.

² *Moore v. Beasum*, 44 N. H. 215; *Brewer v. Hyndman*, 18 N. H. 9; *Arcedechar v. Bowes*, 3 Meriv. 216; *Raymond v. Holborn*, 23 Wis. 57.

³ 1 Dan. Ch. Pr. 306, 307; *Winslow v. Clark*, 47 N. Y. 261; *Dias v. Merle*, 4 Paige, 259; *Hilton v. Lathrop*, 46 Me. 297; *Brown v. Johnson*, 53 Me. 246; *Wigg v. Davis*, 8 Greenl. 31; *McCabe v. Bellows*, 1 Allen, 269; *Barker v. Wood*, 9 Mass. 419; *Elliott v. Patton*, 4 Yerg. 10; *Wolcott v. Sullivan*, 6 Paige Ch. 117; *Enos v. Southerland*, 11 Mich. 538; *Shaw v. Hoadley*, 8 Blackf. 165; *Woodward v. Wood*, 19 Ala. 213; *Beals v. Cobb*, 51 Me. 348; *Doody v. Pierce*, 9 Allen, 141. Upon the death of the mortgagor, either his heir or the personal representatives may bring the suit, because both are interested in the liquidation of the mortgage. *Enos v. Southerland*, 11

§ 353. **Accounting by the mortgagee.** — In the action for redemption, in order to determine the amount then due on the mortgage it is sometimes necessary to have an accounting. An accounting may be ordered whenever the mortgage debt involves a long and tedious account of charges and counter-charges, but it is particularly necessary when the mortgagee has been in possession of the premises, has received the rents and profits of the land, and expended sums of money in keeping the premises in repair. The mortgagor, or other person, praying for redemption, asks for an accounting by the mortgagee. An accounting is an equitable remedy which may be instituted independently of, or in conjunction with, another and the principal suit. The mortgagor and his assigns may ask for an accounting without filing a bill to redeem, or they may request it in connection with the action for redemption. The case is referred to a master in chancery, if there be one, or to a special referee, who ascertains and determines the proper debits and credits of the account between the parties, and reports to the court the balance found due.¹

Mich. 538; *Guthrie v. Sorrell*, 6 Ired. Eq. 13; Gen. Stat. Mass. (1860), sects. 32, 33. And at common law, upon the death of the mortgagee, both the heirs and personal representatives had to be made parties. *Anon.* 2 Freem. 52; *Osborn v. Fallows*, 1 Russ. & M. 741; *Story's Eq. Pl.*, sect. 188; *Haskins v. Homes*, 108 Mass. 379. But under the lien theory of mortgages, the personal representatives of the mortgagee are the only necessary parties. *Copeland v. Yaakum*, 38 Mo. 349. And where a junior mortgagee redeems, he must make the mortgagor, as well as the prior mortgagee, parties defendant. *Farmer v. Curtis*, 2 Sim. 466; *Caddick v. Cook*, 32 Beav. 70; *Rhodes v. Buckland*, 16 Beav. 212; *Palk v. Clinton*, 12 Ves. 48.

¹ *Hunt v. Maynard*, 6 Pick. 439; *Gibson v. Crehore*, 5 Pick. 146; *Bailey v. Myrick*, 52 Me. 136; *Davis v. Lassiter*, 20 Ala. 561; *Doody v. Pierce*, 9 Allen, 141; *Harper's Appeal*, 64 Pa. St. 315; 5 *Wait's Prac.* 288; *Barnard v. Jennison*, 27 Mich. 230; *Adams v. Brown*, 7 Cush. 220; *Hubbell v. Moulson*, 53 N. Y. 225. The mortgagee's assigns, as well as the mortgagee, are liable to be called to account, and the mortgagor's assigns have a right to demand an account. *Brayton v. Jones*, 5 Wis. 117; *Harrison v. Wise*, 24 Conn. 1; *Strang v. Allen*, 44 Ill. 428; *Ruckman v. Astor*, 9 Paige Ch. 517; *Gelston v. Thompson*, 29 Md. 595.

§ 354. **Continued — What are lawful debits?** — In the first place the mortgagee will be charged with whatever rents he may have received, or which he could have received but for his negligence in the management of the estate. This matter has been already discussed in a previous section, and a complete statement of the mortgagee's liability in this connection need not here be repeated.¹ The mortgagee is also chargeable with all damage done to the inheritance by himself, or by others with his authority or permission, whether the acts constitute affirmative or negative waste. Thus he is liable for damages resulting from the opening and working of a mine, as well as from letting the premises fall into decay.²

§ 355. **Continued. — What are lawful credits?** — Since the mortgagee in possession is under an obligation to keep the premises in repair, he is entitled to credit himself with all sums expended for that purpose. But he will not be allowed the expenses incurred in making costly improvements — such as the erection of new buildings, or for any repairs which are not of permanent benefit to the inheritance. The true rule seems to be, that he will be allowed only such expenses as he incurred in making repairs, which were necessary to keep the premises in the same condition as he received them, and for such improvements beyond that limit which were necessary to the ordinary and reasonable enjoyment of the premises. For any other expenses of repair he can be credited only when he has incurred them by and with the consent of the mortgagor.³ But it has been

¹ See *ante*, sect. 325.

² See *ante*, sect. 351.

³ *Russell v. Blake*, 2 Pick. 505; *Reed v. Reed*, 10 Pick. 398; *Crafts v. Crafts*, 13 Gray, 303; *Mickles v. Dillaye*, 17 N. Y. 80; *Moore v. Cable*, 1 Johns. Ch. 385; *Gordon v. Lewis*, 2 Sumn. 143; *Clark v. Smith*, 1 N. J. Eq. 121; *Norton v. Cooper*, 39 Eng. Law & Eq. 130; *Sparhawk v. Wills*, 5 Gray, 423; *Daugherty v. McColgan*, 6 Gill & J. 275; *Harper's Appeal*, 64 Pa. St.

held in some of the States that where lasting and permanent improvements of a truly beneficial character were made by the mortgagee in possession, or by a purchaser, under the mistaken belief that he had, by foreclosure, acquired the absolute title, he will be allowed the value of them.¹ This, probably, is but a deduction from the general betterment laws, which have been enacted in several of the States.² Although the mortgagee is not obliged to purchase a superior or paramount title held by a third person, or to pay the taxes due upon the estate, or to effect an insurance where the mortgage requires the mortgagor to insure, yet if he does any of these acts and incurs expenses for the protection of their joint interests against such forfeiture or loss, he will be permitted to charge them against the mortgagor.³ The mortgagee, however, cannot charge for his personal services in the management of the estate; but if it is necessary to employ others — as, for example, a person to collect the rents — he will be allowed such expenses. And, in some of

315; *Lowndes v. Chisolm*, 2 McCord Ch. 455; *Hopkinson v. Stephenson*, 1 J. J. Marsh. 341; *McConnel v. Holsbush*, 11 Ill. 61; *McCumber v. Gilman*, 15 Ill. 381; *McCarron v. Cassidy*, 18 Ark. 34; *Tharpe v. Feltz*, 6 B. Mon. 15; *Hidden v. Jordan*, 28 Cal. 301; *Neale v. Hagthorpe*, 3 Bland Ch. 590; *Montgomery v. Chadwick*, 7 Iowa, 114; *Adkins v. Lewis*, 5 Oreg. 292; *Balinger v. Choultan*, 20 Mo. 80; *Ford v. Philpot*, 5 Har. & J. 312.

¹ *Miner v. Beekman*, 50 N. Y. 337; *Putnam v. Ritchie*, 6 Paige Ch. 390; *Vanderhaise v. Hughes*, 2 Beas. 410; *Harper's Appeal*, 64 Pa. St. 315; *Barnard v. Jennison*, 27 Mich. 230; *Neale v. Hagthorp*, 3 Bland, 590; *Gillis v. Martin*, 2 Dev. Eq. 470; *Troost v. Davis*, 31 Ind. 34; *Roberts v. Fleming*, 53 Ill. 198; *McLorley v. Larissa*, 100 Mass. 270; *Green v. Wescott*, 13 Wis. 606; *Bacon v. Cottrell*, 13 Minn. 194.

² See *post*, sect. 702.

³ *Clark v. Smith*, 1 N. J. Eq. 121; *Riddle v. Bowman*, 27 N. H. 236; *Muller v. Whittier*, 36 Me. 577; *Hubbard v. Shaw*, 12 Allen, 122; *Williams v. Hilton*, 35 Me. 547; *Robinson v. Ryan*, 25 N. Y. 320; *Mix v. Hotchkiss*, 14 Conn. 32; *Harvie v. Banks*, 1 Rand. 408; *Slee v. Manhattan Co.*, 1 Paige Ch. 81; *Fowley v. Palmer*, 5 Gray, 549; *Nichols v. Baxter*, 5 R. I. 494; *Hagthorp v. Hook*, 1 Gill & J. 270; *McCumber v. Gilman*, 15 Ill. 381; *Weatherby v. Smith*, 30 Iowa, 131; *Davis v. Bean*, 114 Mass. 360; *Harper v. Ely*, 70 Ill. 581; *Rowan v. Sharpe Rifle Co.*, 29 Conn. 282; *Burr v. Veeder*, 3 Wend. 412.

the States, notably Massachusetts, he is allowed a commission where he collects them himself. But the general rule is that he will not be permitted to make any charge for his own services, whatever may be their nature.¹

§ 356. **Making rests.** — In applying the rents and profits received from the estate, the mortgagee may first deduct therefrom the expenses incurred in the management of the mortgaged premises, and then he must apply the remainder to the liquidation of the interest and principal of the debt in that order. If, in making the account, it is ascertained that in any one period — determined by the time when the interest falls due — the rents and profits received are more than sufficient to cover the expenses and the accrued interest, the balance is applied to the principal; and the interest subsequently accruing is computed on the reduced principal. This is called *making a rest*. And rests will be made under such circumstances as often as the interest falls due.²

§ 357. **Balance due.** — If, when the account is stated, it is found that there is a balance still due on the mortgage to the mortgagee, a decree for redemption will be granted upon the payment of that sum. And the report of the referee or

¹ And any agreement that he shall be permitted to charge for such services will not be binding upon the mortgagor. *French v. Barron*, 2 Atk. 120; *Gilbert v. Dyneley*, 3 Mann. & G. 12; *Eaton v. Simonds*, 14 Pick. 98; *Moore v. Cable*, 1 Johns. Ch. 385; *Elmer v. Loper*, 25 N. J. Eq. 475; *Breckenridge v. Brooks*, 2 A. K. Marsh, 335; *Benham v. Rowe*, 2 Cal. 387; *Harper v. Ely*, 70 Ill. 381. In Massachusetts, Connecticut, Pennsylvania and Virginia, the mortgagee may charge a reasonable percentage, usually 5 per cent, for the collection of the rents. *Gerrish v. Black*, 104 Mass. 400; *Waterman v. Curtis*, 26 Conn. 241; *Wilson v. Wilson*, 3 Binn. 557; *Granberry v. Granberry*, 1 Wash. (Va.) 246.

² *Reed v. Reed*, 10 Pick. 398; *Shaffer v. Chambers*, 6 N. J. Eq. 548; *Van Vronker v. Eastman*, 7 Metc. 538; *Connecticut v. Jackson*, 1 Johns. Ch. 13; *Stone v. Seymour*, 15 Wend. 16; *Jencks v. Alexander*, 11 Paige Ch. 619; *Gordon v. Lewis*, 2 Sumn. 147; *Green v. Westcott*, 13 Wis. 606; *Saunders v. Frost*, 5 Pick. 259; *Patch v. Wilde*, 30 Beav. 100; *Gladding v. Warner*, 36 Vt. 54; *Mahone v. Williams*, 39 Ala. 202; *Johnson v. Miller*, 1 Wils. 416.

master, when confirmed by the court, is conclusive as to the amount still owing. On the other hand, if the report shows that the rents and profits received by the mortgagee exceed the expenses and the amount of the mortgage combined, redemption will be decreed, together with an order, directing the mortgagee to pay over to the mortgagor whatever balance is found due to him.¹

§ 358. **Foreclosure — Nature and kinds of.** — In order to bar the mortgagor's equity of redemption, and acquire the absolute title to the property, or to satisfy his debt by a sale of the premises, the mortgagee must bring an action for foreclosure. The decree in such a case bars completely the right to redeem. There are two principal kinds of foreclosure, although the details in both are different in different States, and are governed more or less by local statutes. The more ancient kind is what is called *strict foreclosure*. This is an action in which a decree is rendered barring the mortgagor's equity, and vesting the absolute estate in the mortgagee if the debt is not paid within a certain time after the rendition of the decree. This kind of foreclosure is generally resorted to in the New England States, although in some of them — particularly Massachusetts — the form of the proceeding has been somewhat changed from the old common-law foreclosure. But the decree is essentially the same.² By strict foreclosure, if the mortgagee is out of pos-

¹ Pitman v. Thornton, 66 Me. 469; Holt v. Rees, 46 Ill. 181; Gerrish v. Black, 122 Mass. 76; Seaver v. Durant, 39 Vt. 103; Bell v. Mayor of N. Y., 10 Paige Ch. 49; Freytag v. Hoeland, 23 N. J. Eq. 36; see Wood v. Felton, 9 Pick. 171.

² In Massachusetts, Maine and New Hampshire, the action for strict foreclosure is called a writ of entry, in form, an action at law, but in effect, an equitable proceeding. Gen. Stat. Mass., ch. 140, sects. 1-11; Me. Rev. Stat., ch. 90; Gen. Stat. N. H., ch. 112, 213. But in addition to this action, a strict foreclosure may be effected in the New England States, by entry into possession after condition broken, with a formal notice to the mortgagor, attested by witnesses, that the entry is for the purpose of foreclosure. Gen-

session, he may recover the possession in an action of ejectment.¹ The other so-called *equitable foreclosure* is effected by a decree ordering the property to be sold, and the proceeds of sale applied to the liquidation of the mortgage-debt. If any surplus remains, it is paid over to the mortgagor and his assigns. This mode of foreclosure is juster and fairer to all parties, and, very probably, everywhere in this country, except the New England States, foreclosure is always made by a sale of the premises, even though the right to a strict foreclosure may still exist. Courts of equity will exercise their ordinary power of discretion, and will order a sale of the premises whenever a strict foreclosure would be manifestly to the detriment of the mortgagor.² A bill for foreclosure may be filed at any time after the breach

erally this notice is also required to be published in the newspapers, and a certificate of the entry recorded in the general recording office. And after the lapse of a certain time, fixed by the statute, usually three years, the equity of redemption is foreclosed without any resort to the courts. 2 Jones on Mort., sects. 1237-1275.

¹ *Kershaw v. Thompson*, 4 Johns. Ch. 609; *Schenck v. Conover*, 13 N. J. L. 220; *Montgomery v. Middlemiss*, 21 Cal. 106; *Sutton v. Stone*, 2 Atk. 101. But the decree in strict foreclosure may include an order to the mortgagor to vacate the premises, and then it will not be necessary for the mortgagee to resort to his legal remedies. *Kendall v. Treadwell*, 5 Abb. Pr. 76; *Landon v. Burke*, 36 Wis. 378; *Buswell v. Peterson*, 41 Wis. 82.

² In most of the States there are statutes authorizing foreclosure by sale of the premises, but they are only confirmatory of the power which a court of equity always possessed. *Lansing v. Goelet*, 9 Cow. 352; *Mills v. Dennis*, 3 Johns. Ch. 367; *William's Case*, 3 Bland Ch. 193; *Packer v. Rochester*, etc., R. R., 17 N. Y. 287; *De Haven v. Landell*, 31 Pa. St. 124; *Hinds v. Allen*, 34 Conn. 193; *McCurdy's Appeal*, 65 Pa. St. 290; *Shaw v. Norfolk Co. R. R.*, 5 Gray, 162; *Green v. Crockett*, 2 Dev. & B. Eq. 393; *Belloc v. Rogers*, 9 Cal. 123. Strict foreclosure is recognized now in Alabama, Florida, Illinois, Maryland, Minnesota, New York, but it is only used in special cases, and is generally looked upon as a severe remedy. *Hitchcock v. U. S. Bank of Pa.*, 7 Ala. 386; R. S. Ill. (1877), pp. 120, 540; *Dorsey v. Dorsey*, 30 Md. 522; *Wilder v. Haughey*, 21 Minn. 101; *Bolles v. Duff*, 43 N. Y. 474. In the other States it does not seem to be at all applicable. In all the States the foreclosure of mortgages is regulated by statute in the different States, and they differ widely as to details. See 2 Jones on Mort., sects. 1317-1368, where the distinguishing features of the statutory remedies are fully and accurately presented.

of the condition, provided the action has not been barred by the Statute of Limitations. The condition is broken when the debt falls due. In other words, suit for foreclosure can be brought as soon as an action at law will lie on the debt.¹

§ 359. Continued. — **Who should be made parties?** — Generally all persons should be made parties to a suit for foreclosure who are interested in the mortgage or mortgaged property. The holder of the equity of redemption, subse-

¹ *Gladwyn v. Hitchman*, 2 Vern. 134; *Harding v. Mill River Co.*, 34 Conn. 458; *Giles v. Baremore*, 5 Johns. Ch. 545; *Hughes v. Edwards*, 9 Wheat. 489; *Blethen v. Dwindal*, 35 Me. 556; *Inches v. Leonard*, 12 Mass. 379; *Tripe v. Marcy*, 39 N. H. 439; *Gillett v. Balcom*, 6 Barb. 370; *Williams v. Townsend*, 31 N. Y. 411; *Trayser v. Trustees of Indiana, etc., University*, 39 Ind. 556; *Nevitt v. Bacon*, 32 Miss. 212; *Roberts v. Welch*, 8 Ired. Eq. 287; *Fetrow v. Merriwether*, 53 Ill. 275; *Pope v. Durant*, 26 Iowa, 233. The mortgage may be made to fall due upon the default in the payment of an instalment of interest, and the mortgage may then be foreclosed for the entire debt, although the time for payment has not yet arrived, unless it is expressly provided that the default in payment of interest will not give the right to foreclose. *Stanhope v. Manners*, 2 Eden, 197; *West Branch Bank v. Chester*, 11 Pa. St. 282; *Richards v. Holmes*, 18 How. 143; *Seaton v. Twyford*, L. R. 11 Eq. 591; *Burrowes v. Malloy*, 2 Jones & Lat. 521; *Sire v. Wightman*, 25 N. J. Eq. 102; *De Groot v. McCotter*, 19 N. J. Eq. 531; *Terry v. Eureka College*, 70 Ill. 236; *Harshaw v. McKesson*, 66 N. C. 266; *Cecil v. Dynes*, 2 Ind. 266; *Magruder v. Eggleston*, 41 Miss. 284; *Schooley v. Romain*, 31 Md. 574; *Jones v. Lawrence*, 18 Ga. 277; *Hosie v. Gray*, 71 Pa. St. 198; *Adams v. Essex*, 1 Bibb. 149; *Goodman v. Cin. & C. C. R. R.*, 2 Disney, 176; *Morgenstern v. Klees*, 30 Ill. 422; see *Poweshiek Co. v. Dennison*, 36 Iowa, 352; 19 Am Rep. 521. But where it is not provided that the entire debt shall fall due, upon the default in interest, there may yet be given right of foreclosure for the purpose of enforcing payment of the interest due, by the sale of so much property as is necessary, and a subsequent sale of the remaining property when the rest of the debt falls due. *Bank of Ogdensburg v. Arnold*, 5 Paige, 38; *Peyton v. Ayres*, 2 Md. Ch. 64; *Caufman v. Sayre*, 2 B. Mon. 202; *Buford v. Smith*, 7 Mo. 489; *Magruder v. Eggleston*, 41 Miss. 284; *Poweshiek Co. v. Dennison*, 36 Iowa, 244. The mortgage may also provide that the default of interest may cause the entire debt to fall due, "at the election of the mortgagee." *Randolph v. Middleton*, 26 N. J. Eq. 543; *English v. Carney*, 25 Mich. 178; *Harper v. Ely*, 56 Ill. 179; *Princeton, etc., Co. v. Munson*, 60 Ill. 371; *Schoonmaker v. Taylor*, 14 Wis. 313; *Bosse v. Gallagher*, 7 Wis. 442.

quent purchasers and junior mortgagees, must always be made parties.¹ But one who purchases the equity during the pendency of the suit takes the mortgagor's interest subject to the decree, and need not be made a party.² It has also been held in some States that a prior mortgagee should be made a party.³ And it may be stated that, wherever the mortgage is to be foreclosed by a sale of the premises, the prior mortgagee may be joined in the suit, though he is not a necessary party; it is also advisable to do so, since without him the property can only be sold subject to his out-

¹ *Finley v. U. S. Bank*, 11 Wheat. 304; *Caldwell v. Taggart*, 4 Pet. 190; *McCall v. Yard*, 9 N. J. Eq. 358; *Goodrich v. Staples*, 2 Cush. 258; *Webster v. Vandeventer*, 6 Gray, 428; *Williamson v. Field*, 2 Sandf. Ch. 533; *Vanderkemp v. Shelton*, 11 Paige Ch. 28; *Goodman v. White*, 26 Conn. 317; *Winslow v. Claik*, 47 N. Y. 261; *Haines v. Beach*, 3 Johns. Ch. 459; *Valentine v. Havener*, 20 Mo. 133; *Bates v. Miller*, 48 Mo. 409; *Colter v. Jones*, 52 Ill. 84; *Ohling v. Luitjens*, 32 Ill. 23; *Hunt v. Acre*, 28 Ala. 580; *White v. Watts*, 18 Iowa, 76; *Newcomb v. Dewey*, 27 Iowa, 388; *McArthur v. Franklin*, 15 Ohio St. 509; *Porter v. Clements*, 3 Ark. 364; *Webb v. Maxan*, 11 Texas, 678; *Carpentier v. Williamson*, 25 Cal. 161; *Skinner v. Buck*, 29 Cal. 257.

² *Lloyd v. Passingham*, 16 Ves. 66; *Parkes v. White*, 11 Ves. 236; *Watt v. Watt*, 2 Barb. Ch. 371; *Jackson v. Losee*, 4 Sandf. Ch. 381; *Ostrom v. McCann*, 21 How. Pr. 431; *McPherson v. Honsel*, 13 N. J. Eq. 299; *Loomis v. Stuyvesant*, 10 Paige Ch. 490; *Lyon v. Sanford*, 5 Conn. 548; *Cleveland v. Boerum*, 23 N. Y. 201; *Crooker v. Crooker*, 57 Me. 396; *Snowman v. Harford*, *Id.*, 400; *Haven v. Adams*, 8 Allen, 367; *Poston v. Eubank*, 3 J. J. Marsh. 43; *Bennett v. Calhoun Ass'n*, 9 Rich. Eq. 163; *Hull v. Lyon*, 27 Mo. 570; *Jackson v. Warren*, 32 Ill. 340; *Dickson v. Todd*, 43 Ill. 507; *Hayes v. Shuttuck*, 21 Cal. 51; *Montgomery v. Middlemiss*, 21 Cal. 106; *Abadie v. Lobers*, 36 Cal. 390.

³ Making a prior mortgagee party is equivalent to instituting an action for redemption. *Hudnit v. Nash*, 16 N. J. Eq. 550; *Roll v. Smalley*, 6 N. J. Eq. 464; *Finley v. U. S. Bk.*, 11 Wheat. 306; *Wylie v. McMakin*, 2 Md. Ch. 413; *Standish v. Dow*, 21 Iowa, 363; *Person v. Merrick*, 5 Wis. 231; *Shiveley v. Jones*, 6 B. Mon. 274; *Persons v. Alsip*, 2 Ind. 67. But by the weight of authority prior mortgagees and grantees are not necessary, and hardly proper, parties. *Jerome v. Carter*, 94 U. S. 734; *Weed v. Beebe*, 21 Vt. 499; *Kay v. Whittaker*, 44 N. Y. 505; *Hancock v. Hancock*, 22 N. Y. 568; but see *Morris v. Wheeler*, 45 N. Y. 708; *Tome v. Loan Co.*, 34 Md. 12; *Bogey v. Shute*, 4 Jones Eq. 174; *Walker v. Jarvis*, 16 Wis. 28; *Wright v. Bundy*, 11 Ind. 398; *Summers v. Bromley*, 28 Mich. 125; *Hall v. Hall*, 11 Texas, 547.

standing mortgage.¹ Although in some of the States the wife of the holder of the equity is not held to be a necessary party, it is best always to make her one, and in the cases cited below it has been held to be necessary.² Whether judgment-creditors should be made parties has been differently decided in different States.³ Where the mortgagor has parted with his entire interest in the premises he is not a necessary party, but he may be joined, and must be, if the

¹ *Holcomb v. Holcomb*, 2 Barb. 20; *Vanderkemp v. Shelton*, 11 Paige Ch. 28; *Howard v. Handy*, 35 N. H. 315; *Wood v. Oakley*, 11 Paige Ch. 400; *Weed v. Beebe*, 21 Vt. 495; *Ducker v. Belt*, 34 Md. Ch. 13; *Hagan v. Walker*, 14 How. 37; *Champlin v. Foster*, 7 B. Mon. 104; *Clark v. Prentice*, 3 Dana, 468; *Troth v. Hunt*, 8 Blackf. 580; *Mack v. Grover*, 12 Ind. 254; *Rucks v. Taylor*, 49 Miss. 552; *Brown v. Nevitt*, 27 Miss. 801; *Mims v. Mims*, 1 Humph. 425; *Rowan v. Mercer*, 10 Humph. 359; *Downer v. Clement*, 11 N. H. 40.

² That is, necessary when her dower right is subject to the mortgage. *Mills v. Van Voorhies*, 28 Barb. 125; s. c., 20 N. Y. 412; *Merchants' Bk. v. Thomson*, 55 N. Y. 7; *Johns v. Reardon*, 3 Md. Ch. 57; *Watt v. Alvord*, 25 Ind. 533; *Chambers v. Nicholson*, 30 Ind. 349; *Leonard v. Villars*, 23 Ill. 377; *Wright v. Langley*, 36 Ill. 381; *Mooney v. Maas*, 22 Iowa, 380; *Burnap v. Cook*, 16 Iowa, 149; *McArthur v. Franklin*, 16 Ohio St. 193; *Byrne v. Taylor*, 46 Miss. 95; *Foster v. Hickox*, 38 Wis. 408; *Wisner v. Farnham*, 2 Mich. 472; *Tadlock v. Eccles*, 20 Texas, 783; *Revalk v. Kraemer*, 8 Cal. 66; *Anthony v. Nye*, 30 Cal. 401. But see *Eslana v. Le Petre*, 21 Ala. 504; *Fletcher v. Holmes*, 32 Ind. 497; *Thornton v. Pigg*, 24 Mo. 249; *Riddick v. Walsh*, 15 Mo. 538; *Amphlett v. Hibbard*, 29 Mich. 298; *Etheridge v. Vernoy*, 71 N. C. 184. But where she has not joined in the execution of the mortgage, she cannot be made a party, so as to bar her dower right, unless there is some special defence to her claim. *Brackett v. Baum*, 50 N. Y. 8; *Bell v. Mayor of N. Y.*, 10 Paige Ch. 49; *Mills v. Van Voorhies*, 20 N. Y. 415; *Merchants' Bk. v. Thomson*, 55 N. Y. 7; *Baker v. Scott*, 62 Ill. 86; *Heth v. Cocke*, 1 Rand. 344; *Mooney v. Maas*, 22 Iowa, 380; *Foster v. Hickox*, 38 Wis. 408; *Sheldon v. Patterson* 55 Ill. 507.

³ That they must be, in order to extinguish their equity of redemption, see *Adams v. Paynter*, 1 Coll. 530; *Sharpe v. Scarborough*, 4 Ves. 538; *Brainard v. Cooper*, 10 N. Y. 356; *Gage v. Brewster*, 31 N. Y. 225; *Lyon v. Sanford*, 5 Conn. 544; *Proctor v. Baker*, 15 Ind. 178; *Gaines v. Walker*, 16 Ind. 361. So also, a subsequently attaching creditor. *Lyon v. Sanford*, 5 Conn. 544; *Carter v. Champion*, 8 Conn. 549; *Bullard v. Leach*, 27 Vt. 491. But in the following cases, judgment-creditors are held not to be necessary parties. *Downer v. Fox*, 20 Vt. 388; *Felder v. Murphy*, 2 Rich. Eq. 58; *Person v. Merrick*, 5 Wis. 231; *Mims v. Mims*, 1 Humph. 425.

mortgagee wishes to obtain a personal judgment against him in the same suit for the balance of the debt left unsatisfied by a sale of the mortgaged property.¹ Where the mortgagor is dead, his heirs and his widow must be made parties, and his personal representatives need be, only when a judgment against the mortgagor's estate for the balance is desired, except in Missouri, where they are by statute required to be parties in every case.²

§ 360. **Parties to foreclosure — Continued.** — All persons — such as joint mortgagees, assignees, etc., whether their interest be legal or equitable — who are interested in the mortgage or mortgage-debt, should join in the suit as parties plaintiff. But if any should refuse they must be made defendants.³ Where the mortgagee has assigned the

¹ *Lockwood v. Benedict*, 3 Edw. Ch. 472; *Drury v. Clark*, 16 How. Pr. 424; *Soule v. Albee*, 31 Vt. 142; *Heyer v. Pruyn*, 7 Paige Ch. 465; *Swift v. Edson*, 5 Conn. 153; *Andrews v. Steele*, 22 N. J. Eq. 478; *Delaplaine v. Lewis*, 19 Wis. 476; *Wilkins v. Wilkins*, 4 Port. 245; *Cord v. Hirsch*, 17 Wis. 532; *Stevens v. Campbell*, 21 Ind. 471; *Shaw v. Hoadley*, 8 Blackf. 165; *Moore v. Starks*, 1 Ohio St. 369; *Jackson v. Monell*, 13 Iowa, 300; *Heyman v. Lowell*, 23 Cal. 106; *Bellse v. Rogers*, 9 Cal. 123; *Mich. Ins. Co. v. Brown*, 11 Mich. 265; *Jones v. Lapham*, 15 Kan. 540. But see *Bigelow v. Bush*, 6 Paige Ch. 343; *Buchanan v. Monroe*, 22 Texas, 557. Nor are purchasers of the equity of redemption necessary or proper parties after they have assigned it. *Soule v. Albee*, 31 Vt. 142; *Lockwood v. Benedict*, 3 Edw. Ch. 472; *Hall v. Yoell*, 45 Cal. 584.

² *Farmer v. Curtis*, 2 Sim. 466; *Bradshaw v. Outram*, 13 Ves. 234; *Wood v. Moorhouse*, 1 Lans. 405; *Graham v. Carter*, 2 Hen. & M. 6; *Worthington v. Lee*, 2 Bland Eq. 678; *Mayo v. Tomkies*, 6 Munf. 52; *Boyce v. Bowers*, 11 Rich. Eq. 41; *Averett v. Ward*, Busb. Eq. 192; *Erwin v. Ferguson*, 5 Ala. 158; *Hunt v. Acre*, 28 Ala. 580; *Bollinger v. Chouteau*, 20 Mo. 89; *McIver v. Cherry*, 8 Humph. 713; *Moore v. Stark*, 1 Ohio St. 369; *Bissell v. Marine Co.*, 55 Ill. 165; *Stark v. Brown*, 12 Wis. 572; *Shiveley v. Jones*, 6 B. Mon. 274; *Byrne v. Taylor*, 46 Miss. 95; *Abbott v. Godfroy*, 1 Mich. 178; *Slaughter v. Foust*, 4 Blackf. 379; *Britton v. Hunt*, 9 Kan. 228; *Burton v. Lies*, 21 Cal. 87. But in Georgia and Missouri the personal representatives are necessary parties. *Dixon v. Cuyler*, 77 Ga. 248; *Magruder v. Offut*, Dudley, 227; *Miles v. Smith*, 23 Mo. 502; *Perkins v. Woods*, 27 Mo. 547.

³ *Carpenter v. O'Dougherty*, 58 N. Y. 681; *Noyes v. Sawyer*, 3 Vt. 100; *Rankin v. Major*, 9 Iowa, 297; *Thayer v. Campbell*, 9 Mo. 280; *Pogue v.*

mortgage and debt absolutely, the assignee is the proper party to bring the suit, and the mortgagee need not join; but he is a necessary party, if the assignment is only conditional.¹ But whether the assignee of the debt can bring the suit independently of the mortgagee or legal holder of the mortgage, depends upon the construction given by the courts to the effect of such an assignment. At common law the holder of the legal title to the mortgage must institute the suit as trustee for the assignee of the debt, while, under the lien theory in those States, where the assignment of the debt is held to work an equitable assignment of the mortgage, the assignee may maintain the suit in equity without joining the legal owner of the mortgage. In other States, where the assignment of the debt is held to transfer the legal as well as the equitable title to the mortgage, the assignee may maintain all suits, both in law and equity.² It is now the

Clark, 25 Ill. 351; *Stucker v. Stucker*, 3 J. J. Marsh. 301; *Shirkey v. Hanna*, 3 Blackf. 403; *Woodward v. Wood*, 19 Ala. 213; *Goodall v. Mopley*, 45 Ind. 355; *Johnson v. Brown*, 31 N. H. 405; *Jenkins v. Smith*, 4 Metc. (Ky.) 380; *Bell v. Shrock*, 2 B. Mon. 29; *Wilson v. Heyward*, 2 Fla. 27; *Myers v. Wright*, 33 Ill. 284; *Pettibone v. Edwards*, 15 Wis. 95; *Hartwell v. Blocker*, 6 Ala. 581; *Graydon v. Church*, 7 Mich. 51; *Saunders v. Frost*, 5 Pick. 259; *Wiley v. Pierson*, 23 Texas, 486; *Webster v. Vandeventer*, 6 Gray, 428; *Hopkins v. Ward*, 12 B. Mon. 185; *Beals v. Cobb*, 51 Me. 349; *Davis v. Hemingway*, 29 Vt. 438; *Somes v. Skinner*, 16 Mass. 348. But in *Rankin v. Major*, *supra*, and *Thayer v. Campbell*, *supra*, it was held that the holder of one of two notes secured by the same mortgage may sue alone.

¹ *Whitney v. McKinney*, 7 Johns. Ch. 144; *Miller v. Henderson*, 10 N. J. Eq. 320; *Newman v. Chapman*, 2 Rand. 93; *Kittle v. Van Dyck*, 1 Sandf. Ch. 76; *Hoyt v. Martense*, 16 N. Y. 231; *McGuffey v. Finley*, 20 Ohio, 474; *Garratt v. Packett*, 15 Ind. 485; *Bolles v. Carli*, 12 Minn. 113; *Ward v. Sharp*, 15 Vt. 115; *Overall v. Ellis*, 32 Mo. 322; *Walker v. Bk. of Mobile*, 6 Ala. 452; *Chambers v. Goldwin*, 9 Ves. 264; *Gage v. Stafford*, 1 Ves. sr. 544.

² *Austin v. Burbank*, 2 Day, 476; *Stone v. Locke*, 46 Me. 445; *Moore v. Ware*, 38 Me. 496; *Calhoun v. Tullass*, 35 Ga. 119; *Holdridge v. Sweet*, 23 Ind. 118; *Story Eq. Pl.*, sects. 201, 209; *Martin v. McReynolds*, 6 Mich. 70; see *ante*, sects. 329, 330. And in the Code States it is expressly provided that all actions should be prosecuted in the name of the real party in interest. Under this provision, whether the assignee be considered a legal or only an equitable owner of the mortgage, in either case he is the proper party to institute the suit for foreclosure. 2 Jones on Mort., sect. 1370.

general rule in this country, that upon the death of the mortgagee the mortgage descends with the debt to the personal representatives, and they must, consequently, be the plaintiffs in a suit for foreclosure.¹ If the mortgage be given to two jointly to secure a joint debt, the survivor is the proper party plaintiff, and the deceased mortgagee's representatives are not necessary parties. But if the joint mortgage is given for two separate debts, the rule is different; both the survivor and the representatives of the deceased must join in the suit, and either may institute the proceedings.²

§ 361. **Effect of decree in foreclosure upon the land.** —

A decree in foreclosure bars the interests in the land of the mortgagor, and all claiming under him who have been made parties to the suit. It will have no effect upon the interest of any one who is not a party, and as to him the equity of redemption continues to exist.³ In strict foreclosure, the

¹ *Kinna v. Smith*, 3 N. J. Eq. 14; *Roath v. Smith*, 5 Conn. 133; *Smith v. Dyer*, 16 Mass. 18; *Dewey v. VanDusen*, 4 Pick. 19; Maryland Code (1860), 94; Maine Rev. Stat. (1857), ch. 90, §sect. 10; Gen. Stat. Vt. (1870), 393. *Worthington v. Lee*, 2 Bland, 678; Mo. Rev. Stat. (1855), ch. 113, sect. 4; *Riley v. McCord*, 24 Mo. 265; *Perkins v. Woods*, 27 Mo. 547; *Ratliff v. Davis*, 38 Miss. 107; *Buck v. Fischer*, 2 Col. 182; *Grattan v. Wiggins*, 23 Cal. 16; Comp. Laws Mich. (1871), 1393; Rev. Stat. Wis. (1871), 1223; Rev. Stat. Ohio, ch. 43, sect. 66. *Contra*, *Etheridge v. Vernoy*, 71 N. C. 184; *McIver v. Cherry*, 8 Humph. 713. But if the mortgagee's heir is in possession he must be made a party. *Osborne v. Tunis*, 25 N. J. L. 633; *Huggins v. Hall*, 10 Ala. 283.

² *Blade v. Sanborn*, 8 Gray, 184; *Williams v. Hilton*, 35 Me. 547; *Martin v. McReynolds*, 6 Mich. 70; *Lannay v. Wilson*, 30 Md. 536; *Erwin v. Ferguson*, 5 Ala. 158; *Milroy v. Stockwell*, 1 Cart. (Ind.) 35; *Minor v. Hill*, 58 Ind. 176; 26 Am. Rep. 71. *Contra*, if the debt is several or there are conflicting claims. *Freeman v. Scofield*, 16 N. J. Eq. 28; *Vickers v. Cowell*, 1 Beav. 529; *Mitchell v. Burnham*, 44 Me. 305; *Burnett v. Pratt*, 22 Pick. 556.

³ *Packer v. Rochester, etc.*, R. R. 17 N. Y. 287; *Kershaw v. Thompson*, 4 Johns. Ch. 609; *DeHaven v. Landell*, 31 Pa. St. 124; *Hindo v. Allen*, 34 Conn. 193; *Ritger v. Parker*, 8 Cush. 149; *Kraemer v. Rebman*, 9 Iowa, 114; *Tallman v. Ely*, 6 Wis. 244; *Burton v. Lies*, 21 Cal. 91; *Montgomery v. Tutt*, 11 Cal. 192; *Hodson v. Treat*, 7 Wis. 263. In equitable foreclosure by sale, some of the statutes require that a certain time be given to the mortgagor

decree makes the estate absolute in the mortgagee. His title, whatever it is held to be before foreclosure, becomes afterwards a legal estate in lands and descends to the heirs, instead of the personal representatives.¹ But, in some of the States, if the mortgagee dies before a suit for strict foreclosure has been instituted, and it is brought by the personal representatives, the estate, for the purpose of distribution, partakes of the character of personalty, and the title vests in those who became, by the death of the mortgagee, entitled to the mortgage-debt.² The decree in a foreclosure suit is binding upon infant holders of the equity to the same extent as adults, except that if the foreclosure is irregular

after the sale to redeem the estate, and a court of equity in the exercise of its discretion may, in the absence of a statute, provide for such a period of redemption before sale. *Perine v. Dunn*, 4 Johns. Ch. 140; *Durrett v. Whiting*, 7 B. Mon. 547; *Richardson v. Parrott*, 7 B. Mon. 379; *Smith v. Hoyt*, 14 Wis. 252; *Stockton v. Dundee Manfg. Co.*, 22 N. J. Eq. 56; *Harkins v. Forsyth*, 11 Leigh, 294. In Alabama, California, Oregon, Michigan, Minnesota, Wisconsin, Tennessee, Iowa, Illinois, there are statutes regulating the right of redemption. 2 Washb. on Real Prop. 261-269, note. And where there is a time for redemption after the sale, the decree must not direct a delivery of the deed until this period for redemption has expired. But a certificate is generally given to the purchaser. *Boester v. Byrne*, 72 Ill. 466; *Rhinehart v. Stevenson*, 23 Ill. 524; *Jones v. Gilman*, 14 Wis. 450; *Walker v. Jarvis*, 16 Wis. 28; *Harlan v. Smith*, 6 Cal. 173. Until delivery of the deed, the mortgagor is entitled to the rents and profits of the land. *Clason v. Corley*, 5 Sandf. Ch. 447; *Whalin v. White*, 25 N. Y. 464; *Whitney v. Allen*, 21 Cal. 233. But when the deed is delivered, it operates *nunc pro tunc* from the date of the sale, and bars any intervening attaching rights. And although the decree be erroneous for some irregularity, it cannot be attacked collaterally, and the title of a *bona fide* purchaser, during pendency of the suit, cannot thereby be avoided, notwithstanding the decree has subsequently been reversed. *Graham v. Bleakie*, 2 Daly, 55; *Horner v. Zimmerman*, 45 Ill. 14; *Burford v. Rosenfeld*, 37 Texas, 42; *Torroms v. Hicks*, 32 Mich. 307; *Ogden v. Walters*, 12 Kan. 282; *Markel v. Evans*, 47 Ind. 326; *Miller v. Sharp*, 49 Cal. 233. But see *Brindernagle v. German Ref. Church*, 1 Barb. Ch. 15.

¹ *Brainard v. Cooper*, 10 N. Y. 359; *Goodman v. White*, 26 Conn. 322; *Bradley v. Chester Val. R. R.*, 36 Pa. St. 150; *Kendall v. Freadwell*, 14 How. Pr. 165; *Farrell v. Parlier*, 50 Ill. 274; *Osborne v. Tunis*, 25 N. J. L. 633; *Swift v. Edson*, 5 Conn. 531.

² Mass. Gen. Stat., ch. 96, sects. 10, 1 B, 14; *Fifield v. Sperry*, 20 N. H. 338.

on account of some defect in the proceeding, he may take advantage of such error within a reasonable time after arriving at his majority. And this is the rule, whether the foreclosure is in equity or at law; but for the protection of his interests, it is generally required that the infant be represented in the suit by a guardian *ad litem*.¹ So also is the decree binding upon married women, if their husbands are joined with them as parties to the suit. And the failure of the husband to defend will not constitute a ground for setting aside the decree; at least, where the foreclosure is by a sale of the premises.² But the decree only transfers whatever interest is claimed by or through the mortgagor. It vests that interest in the mortgagee or purchaser, but cannot bar the interests held by persons who are not privies to the mortgagor. The decree, therefore, does not affect any paramount title which is held or claimed by such persons, even though they have been made parties to the suit.³ This is the case in all technical suits for foreclosure; but where, as in Maine and Massachusetts, the suit for foreclosure is in

¹ If it be a strict foreclosure, the infant would be bound by the decree, if he does not show some defect in the foreclosure proceeding within a reasonable time after his arrival at majority. 2 Cruise Dig. 199; *Mills v. Dennis*, 3 Johns. Ch. 367. But the infant is bound by a sale under the decree, if he has been properly made a party to the action notwithstanding the irregularity. *Mills v. Dennis*, *supra*; 2 Washb. on Real Prop. 259.

² *Mallack v. Galton*, 3 P. Wms. 352; *Mooney v. Maas*, 22 Iowa, 380; *Wolf v. Banning*, 3 Minn. 202; *Mavrick v. Grier*, 3 Nev. 52. But in the States where married women hold their property independent of their husbands, it seems unnecessary to make the husband a party. *Somerset, etc., Ass'n v. Camman*, 11 N. J. Eq. 382; *Thornton v. Pigg*, 24 Mo. 249. And the same rule now prevails in Massachusetts for a different reason. *Davis v. Wetherell*, 13 Allen, 62; *Newhall v. Sav. Bk.* 101 Mass. 430.

³ *Concord, etc., Ins. Co. v. Woodbury*, 45 Me. 447; *Broome v. Beers*, 6 Conn. 198; *Corning v. Smith*, 6 N. Y. 82; *Lewis v. Smith*, 9 N. Y. 514; *Eagle F. Ins. Co. v. Lent*, 6 Paige Ch. 635; *Mooney v. Maas*, 22 Iowa, 22; *Strobe v. Downer*, 13 Wis. 10; *Pelton v. Farmin*, 18 Wis. 227; *Palmer v. Yager*, 20 Wis. 103; *Banning v. Bradford*, 21 Minn. 308; 18 Am. Rep. 398; *Grattan v. Wiggins*, 23 Cal. 32; *Holcomb v. Holcomb*, 2 Barb. 20; *Brundage v. Missionary Society*, 60 Barb. 205.

the nature of an action at law for the recovery of possession, if the person in possession holds under a superior title, it would be necessary, or, at least proper, to assert such title. But this is really not an exception to the rule above cited, since wherever the mortgagee may maintain the action of ejectment the question of a paramount title might be raised by the party in possession, if he is not the mortgagor.¹

§ 362. **The effect of foreclosure upon the debt.**—If the suit be for strict foreclosure, all actions on the surplus of the debt remaining unsatisfied are barred as long as the foreclosure is upheld; but if the mortgagee—in the case that the value of the property is not sufficient to satisfy the entire debt—wishes to pursue his remedy for the unsatisfied balance, it will reopen the foreclosure, and the property will or may be sold under judicial decree, in order to ascertain its actual value, and the amount of the judgment to be entered up against the debtor.² Where the decree directs a sale of the premises, the proceeds of sale are applied to the liquidation of the debt, and if they are not sufficient to pay the whole debt, the mortgagee has his remedies for the balance, which are the ordinary actions at law for the recovery of a debt. It is usual, however, for the court of equity, in rendering a decree in foreclosure for the sale of the mortgaged premises, to give judgment for the unpaid surplus against the mortgagor and others who may be jointly

¹ *Hunt v. Hunt*, 17 Pick. 118; *Keith v. Swan*, 11 Mass. 216; *Johnson v. Phillips*, 13 Gray, 198; *Churchill v. Loring*, 19 Pick. 465; *Wheelwright v. Freeman*, 12 Metc. 154; *Whittier v. Dow*, 14 Me. 298.

² *Lovell v. Leland*, 3 Vt. 581; *Osborne v. Tunis*, 25 N. J. L. 633; *Spencer v. Harford*, 4 Wend. 381; *Morgan v. Plumb*, 9 Wend. 287; *Andrews v. Scotton*, 2 Bland, 666; *Paris v. Hulett*, 26 Vt. 308; *Edgerton v. Young*, 43 Ill. 470; *Bean v. Whitcomb*, 13 Wis. 431; *Bassett v. Mason*, 18 Conn. 136; *Porter v. Pillsbury*, 86 Me. 278; *Patten v. Pearsen*, 57 Me. 434; *Hunt v. Stiles*, 10 N. H. 466; *Smith v. Packard*, 19 N. H. 575; *Amory v. Fairbanks*, 3 Mass. 563; *Leland v. Loring*, 10 Metc. 122; *Lansing v. Goelet*, 9 Cow. 346.

liable with him.¹ The remedies of the mortgage are two-fold: first, against the property mortgaged, and secondly, on the personal liability of the mortgagor. These remedies are independent of each other, and, although there can be but one payment of the debt, the prosecution of one of these remedies does not bar the right to pursue the other, and they may be employed simultaneously in separate proceedings.² But in some of the States—notably New York—judgment will not be rendered in an action at law on the debt, while a suit for foreclosure is pending, without leave of the court in which such suit is filed.³ This rule of practice, no doubt, rests upon the ground that the entry of judgment in the proceeding at law would be useless, since in the foreclosure suit judgment will be given for any balance remaining unsatisfied.

¹ *Dunkley v. Van Buren*, 3 Johns. Ch. 330; *Deare v. Carr*, 3 N. J. Eq. 513; *Pierce v. Potter*, 7 Watts, 475; *Mott v. Clark*, 9 Pa. St. 399; *Andrews v. Scotton*, 2 Bland, 666; *Hale v. Rider*, 5 Cush. 231; *Jones v. Conde*, 6 Johns. Ch. 77; *Payne v. Harrell*, 40 Miss. 498; *Stark v. Mercer*, 3 How. (Miss.) 377; *Marston v. Marston*, 45 Me. 412; *Gage v. Brewster*, 31 N. Y. 220; *Johnson v. Harmon*, 19 Iowa, 58; *Drayton v. Marshall*, Rice Eq. 386; *Rollins v. Forbes*, 10 Cal. 299; *Lee v. Kingsbury*, 13 Texas, 69. There are statutory provisions, for rendering a judgment for any unsatisfied balance in the foreclosure suit, in Arkansas, California, Indiana, Michigan, Minnesota, New York, Missouri, Texas and Iowa. See 2 Washb. on Real Prop. 261-269, note.

² *Booth v. Booth*, 2 Atk. 343; *Hale v. Rider*, 5 Cush. 231; *Jones v. Conde*, 6 Johns. Ch. 77; *Burnell v. Martin*, 2 Dougl. 417; *Att'y-Gen. v. Winstanley*, 5 Bligh, 130; *Wiswell v. Baxter*, 20 Wis. 680; *Tappan v. Evans*, 11 N. H. 311; *Hughes v. Edwards*, 9 Wheat. 487; *M'Call v. Lenox*, 9 Serg. & R. 302; *Gilman v. Ill. & Miss. Tel. Co.*, 91 U. S. 603; *Thornton v. Pigg*, 24 Mo. 249; *Very v. Watkins*, 18 Ark. 546; *O'Leary v. Snediker*, 16 Ind. 404; *Riblett v. Davis*, 24 Ohio St. 114; *Slaughter v. Foust*, 4 Blackf. 379; *Payne v. Hanell*, 40 Miss. 498; *Delahay v. Clement*, 4 Ill. 201; *Longworth v. Flagg*, 10 Ohio, 300; *Downing v. Palmeter*, 1 B. Mon. 64; *Christy v. Dyer*, 14 Iowa, 413.

³ *Williamson v. Champlin*, 8 Paige Ch. 70; *Snydam v. Bartle*, 9 Paige Ch. 294; 3 Rev. Stat. N. Y. (1875) 198. In Michigan, Iowa and Indiana the same statute rules prevail. Mich. Comp. Laws (1871), 1549; Code of Iowa (1873), sect. 3320; 2 Ind. Rev. Stat. (1876) 259. In Minnesota no suit at law on the debt may be instituted until the foreclosure suit is ended. *Johnson v. Lewis*, 13 Minn. 364.

§ 363. **Mortgages with power of sale.**—In order to avoid the burdensome and expensive proceedings for foreclosure, the idea was conceived of giving to the mortgagee the power to sell the mortgaged premises upon the breach of the condition, and apply the proceeds of sale to the liquidation of the mortgage-debt. It was at first doubted whether such a power was valid, when granted either in the mortgage or in a separate instrument. It was considered as a contemporaneous agreement, which, in its exercise, curtailed the mortgagee's right to redeem, and, therefore, was void. But the power of sale is now generally held to be good, since it does not abridge or take away the ordinary remedies for foreclosure, and is not in theory a means of foreclosing the mortgagor's equity of redemption.¹ It is a power coupled with an interest, and is, therefore, irrevocable by the mortgagor. It operates as the appointment of a use, which, under the Statute of Uses, becomes executed into a legal estate in the purchaser, and has all the characteristics that are met with in ordinary powers of appointment under that statute.² It is not determined by the death of either party, as is the case with common-law powers of

¹ *Wilson v. Troup*, 7 Johns. Ch. 25; *Smith v. Provin*, 4 Allen, 518; *Kinsley v. Ames*, 2 Metc. 29; *Calloway v. People's Bk.*, 54 Ga. 441; *Longworth v. Butler*, 3 Gilm. 32; *Bloom v. Van Rensselaer*, 15 Ill. 503; *Fanning v. Kerr*, 7 Iowa, 462; *Wing v. Cooper*, 37 Vt. 184; *Sims v. Hundley*, 3 Miss. 896; *Mann v. Best*, 62 Mo. 491; *Clark v. Condit*, 18 N. J. Eq. 358; *Hyman v. Deveraux*, 63 N. C. 624; *Bradley v. Chester Valley R. R.*, 36 Pa. St. 141; *Walthall's Executors v. Rives*, 34 Ala. 91; *Mitchell v. Bogan*, 11 Rich. L. 686; *Crowning v. Cox*, 1 Rand. 306; *Morrison v. Bean*, 15 Texas, 267; *Turner v. Johnson*, 10 Ohio, 204.

² *Wilson v. Troup*, 2 Cow. 236. The difficulty of the courts at first, in determining the validity of a sale under the power, is, no doubt, traceable to a failure to apply to that case the doctrine of powers of appointment under the Statute of Uses. The ordinary mortgage is, in form and effect, a deed of bargain and sale, and the grant of a power of sale therein may be construed as the limitation of a use. See *post*, Chapter XV., on Powers. But in most of the States, where mortgages with power of sale are in common use, they are expressly authorized by statute, and there is no need of this construction in order to establish their validity.

attorney; it descends to the mortgagee's heirs at his death,¹ and passes to the assignee of the mortgage, except where only a part of the mortgage-debt is assigned. The power is indivisible, and, therefore, in a partial assignment, remains in the mortgagee, who must exercise it for the benefit of both parties.² The power of sale need not be limited to the estate of the mortgagee. While the mortgage may only cover a life estate, the power might authorize a sale of the fee.³

§ 364. **Character of the mortgagee in relation to the power.** — As donee of the power, the mortgagee assumes the character of trustee for himself and the mortgagor, and all other parties having interests in the mortgaged premises. In this capacity he is under the ordinary obligations of a trustee, and bound in his actions by the same rules of duty. In the execution of the power he must exercise the most

¹ When it is stated in the text that the power of sale passes to the heirs of the mortgagee, reference is only had to those States where the mortgage itself descends to the heir. But in most of the States the power of sale descends with the mortgage to the personal representatives, and may be exercised by them, although the power is expressly limited to the "heirs and assigns." *Demarest v. Wynkoop*, 3 Johns. Ch. 125; *Johnson v. Turner*, 7 Ohio, 568; *Berry v. Skinner*, 30 Md. 573; *Harnickle v. Wells*, 50 Ala. 198; *Collins v. Hopkins*, 7 Iowa, 463. In Missouri and Illinois, and perhaps in other States, upon the death of the mortgagee the sheriff may be directed to execute the power, or a new trustee can be appointed upon the application of any one interested therein.

² *Doolittle v. Lewis*, 7 Johns. Ch. 45; *Wilson v. Traup*, 2 Cow. 236; *Jencks v. Alexander*, 11 Paige Ch. 619; *Berger v. Bennett*, 1 Caines's Cas. 1; *Slee v. Manhattan Co.*, 1 Paige Ch. 48; *Harnickell v. Orndoff*, 35 Md. 341; *Pease v. Pilot Knob, etc., Co.*, 49 Mo. 124; *Pickett v. Jones*, 63 Mo. 195; *Niles v. Ransdorf*, 1 Mich. 333; *Strother v. Law*, 54 Ill. 413; *Bush v. Sherman*, 80 Ill. 160. And this is also true where the assignment of the debt works an assignment of the mortgage. Such an assignee may exercise the power in those States where such a transaction is looked upon as a legal assignment. See cases *supra*. And the assignee may exercise the power, although the assignment has not been recorded. *Montague v. Dawes*, 12 Allen, 397; *s. c.*, 14 Allen, 373.

³ *Sedgwick v. Laffin*, 10 Allen, 430; *Butler v. Ladue*, 12 Mich. 173; *Torrey v. Cook*, 116 Mass. 165.

scrupulous care to render the sale of the premises as beneficial as possible to all parties concerned. In most of the States where mortgages with power of sale are in common use, the execution of the power is regulated by local statutes. But in the absence of statutory regulations, sales under the power are governed by the same rules as apply to the sale of other trust property.¹ A failure to observe the statutory requirements, or the terms of the power, will invalidate the deed of conveyance made in pursuance of the sale, even in the hands of a purchaser without actual notice. There must be a substantial compliance with such regulations, in order to pass a good title to the purchaser.²

¹ *Howard v. Ames*, 3 Metc. 311; *Robertson v. Norris*, 1 Giff. 424; *Jencks v. Alexander*, 11 Paige Ch. 624; *Ellsworth v. Lockwood*, 42 N. Y. 89; *Leet v. McMaster*, 51 Barb. 236; *Montague v. Dawes*, 14 Allen, 369. Mere inadequacy of price will not vitiate the sale, but if the property has been so grossly sacrificed that the purchaser may be presumed to know of it, the sale will be avoided. *Vail v. Jacobs*, 62 Mo. 150; *King v. Bronson*, 122 Mass. 122; *Horsey v. Hough*, 38 Md. 130; *Landrum v. Union Bk. of Mo.*, 63 Mo. 48. And any fraudulent mismanagement or deception practised upon the mortgagor will avoid the sale, if the purchaser participates in it, or is cognizant of it. *Banta v. Maxwell*, 12 How. Pr. 479; *Lee v. McMasters*, 51 Barb. 236; *Encking v. Simmons*, 28 Wis. 272; *Bush v. Sherman*, 80 Ill. 160; *Hurd v. Case*, 32 Ill. 45; *Jackson v. Crafts*, 18 Johns. 110; *Mapps v. Sharpe*, 32 Ill. 13; *Mann v. Best*, 62 Mo. 491. The action to set aside a sale under a power is an equitable proceeding to redeem the property. A bill to set aside the sale, without offering to redeem, will not be entertained. *Candee v. Burke*, 1 Hun, 546; *Vroom v. Ditmas*, 7 Cow. 13; *Robinson v. Ryan*, 25 N. Y. 320; *Schwartz v. Sears*, Walk. (Mich.) 170. But the bill must be filed within a reasonable time after the discovery of the fraud or other equitable claim. Acquiescence is treated as a waiver of all irregularities in the sale. *Hamilton v. Lubukee*, 51 Ill. 415; *Bush v. Sherman*, 80 Ill. 160; *Hoffman v. Harrington*, 33 Mich. 392; *Landrum v. Union Bk. of Mo.*, 63 Mo. 48.

² *Smith v. Provin*, 4 Allen, 518; *Roarty v. Mitchell*, 7 Gray, 243; *Bradley v. Chester Val. R. R.*, 36 Pa. St. 141; *Longwith v. Butler*, 3 Gilm. 32; *Cooper v. Crosby*, *Id.* 508; *John v. Bumpstead*, 17 Barb. 100; *Root v. Wheeler*, 12 Abb. Pr. 294; *Gibson v. Jones*, 5 Leigh, 370; *Ormsby v. Tarascon*, 3 Litt. 404; *Dana v. Farrington*, 4 Minn. 433. Among others, the following circumstances have been deemed sufficient to set aside the sale: Neglect to give the required notice to the parties interested. *Low v. Purdy*, 2 Lans. 422; *King v. Duntz*, 11 Barb. 191; *Randall v. Hazleton*, 12 Allen, 442; *Hull v. Cushman*,

§ 365. **Purchase by mortgagee at his own sale.** — Since the mortgagee as donee of the power is a trustee for all parties concerned, he will not be permitted to purchase at his own sale, directly or indirectly, unless he is authorized to do so by statute or by the terms of the mortgage. And such a purchase may be avoided at the instance of the mortgagor, even though the consideration be fair and adequate.¹

14 N. H. 171; *Green v. Cross*, 45 N. H. 594; *Drinan v. Nichols*, 115 Mass. 353; *Carpenter v. Black Hawk, etc., Co.*, 65 N. Y. 43; *Lee v. Mason*, 10 Mich. 403; *Rutherford v. Williams*, 42 Mo. 18. An insufficient publication of notice. *Lawrence v. Farmers' Loan, etc., Co.*, 13 N. Y. 642; *Elliott v. Wood*, 45 N. Y. 71; *Gibson v. Jones*, 5 Leigh, 370; *Hoffman v. Anthony*, 6 R. I. 282; *Doyle v. Howard*, 16 Mich. 261; *Butterfield v. Farnham*, 19 Minn. 85; *Bush v. Sherman*, 80 Ill. 160; *Hubbell v. Sibley*, 50 N. Y. 468; *Calloway v. People's Bank*, 54 Ga. 441; *Fenner v. Tucker*, 6 R. I. 551; *Banning v. Armstrong*, 7 Minn. 46. It is not usually necessary to sell the property in parcels, but if it is essentially advantageous to the mortgagor, a failure to do so will vitiate the sale. *Rowley v. Brown*, 1 Binn. 61; *Chesley v. Chesley*, 49 Mo. 540; *s. c.*, 54 Mo. 347; *Sumrall v. Chaffin*, 48 Mo. 402; *Ellsworth v. Lockwood*, 42 N. Y. 89; see statutes in New York, and several other States to the same effect. A sale on credit, when that is not expressly authorized, is invalid. *Olcutt v. Bynum*, 17 Wall. 44; *Mead v. McLaughlin*, 42 Mo. 198; see 2 Jones on Mort., sects. 1868, 1869. But he may give credit for what is coming to him, although not authorized. *Strother v. Law*, 54 Ill. 413. A sale is absolutely void only where there is a complete failure to comply with an essential requirement, (*Bigler v. Waller*, 14 Wall. 297;) and only voidable at the election of the parties, when the exercise of a discretion as to the manner of compliance is irregular or unwise. *Ingle v. Culbertson*, 43 Iowa, 265. And to avoid the sale in the hands of a purchaser for value, notice of the irregularity must be brought to him. *Beatie v. Butler*, 21 Mo. 320; *Mann v. Best*, 62 Mo. 461; *Sternberg v. Dominick*, 14 Johns. 435; *Montague v. Dawes*, 12 Allen, 397; *Hoit v. Russell*, 56 N. H. 559; *Hamilton v. Lubukee*, 51 Ill. 415; *Jackson v. Henry*, 10 Johns. 185.

¹ *Downes v. Grazebrook*, 3 Meriv. 207; *Davone v. Fanning*, 5 Johns. Ch. 257; *Jackson v. Walsh*, 14 Johns. 415; *Elliott v. Wood*, 45 N. Y. 71; *Patten v. Pearson*, 57 Me. 435; *Jennison v. Hapgood*, 7 Pick. 1; *Howard v. Ames*, 3 Metc. 308; *Dyer v. Shurtleiff*, 112 Mass. 165; 17 Am. Rep. 77; *Hyndman v. Hyndman*, 19 Vt. 9; *Montague v. Dawes*, 12 Allen, 400; *Hall v. Bliss*, 118 Mass. 560; 19 Am. Rep. 475; *Waters v. Groom*, 11 Clark. & F. 684; *Michaud v. Girod*, 4 How. 553; *Scott v. Freeland*, 7 Smed. & M. 418; *Hall v. Towne*, 45 Ill. 493; *Roberts v. Fleming*, 53 Ill. 196; *Rutherford v. Williams*, 42 Mo. 18; *Parmenter v. Walker*, 9 R. I. 225; *Whitehead v. Hellen*, 76 N. C. 99; *Korns v. Shaffer*, 27 Md. 83; *Benham v. Rowe*,

The purchase by the mortgagee without express authority is, however, only voidable at the election of the mortgagor and his privies. And they cannot invalidate the sale, if the property in the meantime has passed into the hands of an innocent purchaser.¹

§ 366. **Extinguishment of the power.** — The power is extinguished by any acts, which will discharge the mortgage, such as payment or tender of payment, and the exercise of the power afterwards will not vest a good title in any purchaser,² unless the mortgagor by his own acts is estopped

2 Cal. 387. Statutory provisions, authorizing the mortgagee to purchase at his own sale, are to be found in New York, Michigan, Wisconsin, Minnesota, Maryland. 2 Washb. on Real Prop. 74; 2 Jones on Mort., sect. 1740. It is not necessary to show fraud or unfair dealing in order to avoid purchase by the mortgagee. *Rutherford v. Williams*, 42 Mo. 18; *Thornton v. Irwin*, 43 Mo. 153; *Blockley v. Fowler*, 21 Cal. 326. *Contra*, *Richards v. Holmes*, 18 How. 143; *Howard v. Davis*, 6 Texas, 174; *Hamilton v. Lubukee*, 51 Ill. 420. When the sale is made under a judicial decree, or by a public officer, when that is permitted, there is no restriction upon the right of the mortgagee to purchase. *Richards v. Holmes*, 18 How. 143; *Bloom v. Rensselaer*, 15 Ill. 503; *Allen v. Chatfield*, 8 Minn. 435; *Ramsey v. Merriam*, 6 Minn. 168. *Contra*, *Saines v. Allen*, 58 Mo. 537

¹ *Dexter v. Shepard*, 117 Mass. 480; *Burns v. Thayer*, 115 Mass. 89; *Robinson v. Cullom*, 41 Ala. 693; *Edmondson v. Welsh*, 27 Ala. 578; *Rutherford v. Williams*, 42 Mo. 18; *Thurston v. Prentiss*, 1 Mich. 193; *Benham v. Rowe*, 2 Cal. 387. And the right to avoid the sale is extinguished by ratification of the mortgagor, or his acquiescence therein for an unreasonably long time. *Dobson v. Racey*, 8 N. Y. 216; *Nichols v. Baxter*, 5 R. I. 491; *Patten v. Pearson*, 60 Me. 223; *Learned v. Foster*, 117 Mass. 365; *Bergen v. Bennett*, 1 Caines's Cas. 19; *Munn v. Burgess*, 70 Ill. 604; *Medsker v. Swaney*, 45 Mo. 273.

² *Cameron v. Irwin*, 5 Hill, 272; *Charter v. Stevens*, 3 Denio, 33; *Burnet v. Dennister*, 5 Johns. Ch. 35; *Warner v. Blakeman*, 36 Barb. 501; 2 Jones on Mort., sects. 886–893; *Jenkins v. Jones*, 2 Giff. 99; *Lowe v. Grinnan*, 19 Iowa, 192. Tender after condition broken does not at common law extinguish the power. *Cranston v. Crane*, 97 Mass. 459; *Montague v. Dawes*, 12 Allen, 397. But in most of the States, payment has the same effect after as well as before condition broken. *Jenkins v. Jones*, *supra*; *Cameron v. Irwin*, *supra*; *Flower v. Elwood*, 66 Ill. 438; *Burnet v. Denniston*, 5 Johns. Ch. 35; *Whelom v. Reilly*, 61 Mo. 565; see 2 Jones on Mort., sect. 893; and *ante*, sect. 333. But as long as the mortgage remains unsatisfied on the records, a sale after payment would be upheld in favor of a purchaser for value and without notice;

from denying the validity of the sale. Thus, for example, if the mortgagor is present at the sale and makes no protest, and gives no notice of his rights to the bystanders, he will be precluded under the doctrine of estoppel from setting aside the sale as against an innocent purchaser.¹

§ 367. **Application of the purchase-money.** — The mortgagee, on receiving the proceeds of sale, must apply it first to the expenses of the sale, and then to the satisfaction of the mortgage-debt. And if there is a surplus remaining, he holds it in trust for the junior incumbrancers, and lastly, the mortgagor. Such surplus has in equity all the qualities of real estate, and, if the mortgagor has died, will be distributed among the widow and heirs, instead of going to his personal representatives.²

§ 368. **Deeds of trust.** — Somewhat similar in effect to mortgages with power of sale are deeds of trust, in which the property is conveyed to a trustee in trust to secure the creditor in his claim, and to sell the property for the satis-

Elliott v. Wood, 53 Barb. 285; *Brown v. Cherry*, 56 Barb. 635; *Warner v. Blakeman*, 36 Barb. 501.

¹ *Cromwell v. Bank of Pittsburg*, 2 Wall. jr. 569; *Smith v. Newton*, 38 Ill. 230.

² *Buttrick v. Wentworth*, 6 Allen, 79; *Andrews v. Fisk*, 101 Mass. 422; *Dunning v. Dean Nat. Bank*, 61 N. Y. 497; 19 Am. Rep. 293; *Sweezy v. Thayer*, 1 Duer, 286; *Hawley v. Bradford*, 9 Paige, 200; *Pickett v. Buckner*, 45 Miss. 226; *Fox v. Pratt*, 27 Ohio St. 512; *Hinchman v. Stiles*, 9 N. J. Eq. 454; *Shaw v. Hoodley*, 8 Blackf. 165; *Foster v. Potter*, 37 Mo. 534; *Reid v. Mullins*, 43 Mo. 306. In Vermont and Michigan, the surplus is held to be personalty, and vests in the personal representatives instead of the widow and heirs. *Varnum v. Meserve*, 8 Allen, 158; *Smith v. Smith*, 13 Mich. 258. The surplus is distributed among the claimants according to the priority of their respective interests, and their rights in case of a dispute may be settled by a suit against the mortgagee for the recovery of their alleged share in the surplus. *Bevier v. Schoonmaker*, 29 How. Pr. 411; *Cope v. Wheeler*, 41 N. Y. 303; *Stoevev v. Stoevev*, 9 Serg. & R. 434; *Matthews v. Duryea*, 45 Barb. 69. Or the mortgagee may file a bill of interpleader, and compel the adverse claimants to settle their disputes. *Bleeker v. Graham*, 2 Edw. Ch. 647; *The People v. Ulster Com. Pleas*, 18 Wend. 628; *Bailey v. Merritt*, 7 Minn. 159.


faction of the debt, if it is not paid at maturity. This conveyance is in the nature of a mortgage, and is very often used to secure an issue of railroad bonds, so as to avoid the necessity of giving a mortgage to each bond. But it is also very generally used in some of the Western States in the place of an ordinary mortgage, in order to obviate the difficulty of securing a valid sale of the premises, which is so often experienced when the mortgagee exercises the power of sale. It is the conveyance of a legal estate in trust to secure the debt and its satisfaction by sale upon the breach of the condition.¹ And it has been held that mere payment of the debt will not revest the title in the grantor.² But the payment or tender of payment will render the trust inoperative so far as the subsequent exercise of the power is concerned.³ The grantor by such a conveyance divests himself of his entire legal estate in possession, and has nothing left, against which execution may issue. But he has a reversionary interest, which in equity may be reached by a creditor's bill, and which is also capable of alienation.⁴ If the trustee dies or refuses to execute the trust, the court will appoint another to take his place; and in some of the States, by statute, it is provided that, upon the death, inability or

¹ *Devin v. Hendershott*, 32 Iowa, 194; *Newman v. Samuels*, 17 Iowa, 536; *Sargent v. Howe*, 21 Ill. 149; *Thornton v. Boyd*, 31 Ill. 200; *Sherwood v. Saxton*, 63 Mo. 78; *Soutter v. Miller*, 15 Fla. 625; *Richard v. Holmes*, 18 How. 147; *Coe v. McBrown*, 22 Ind. 257; *Webb v. Hoselton*, 4 Neb. 308; 19 Am. Rep. 638; *Woodruff v. Robb*, 19 Ohio, 122; *Chappell v. Allen*, 38 Mo. 213. See *Heard v. Baird*, 40 Miss. 799; *Lenox v. Reed*, 12 Kan. 233. But see 2 Am. Law Reg. (N. S.) 655.

² *Heard v. Baird*, 40 Miss. 796. But the weight of authority is in favor of holding that a reconveyance is not necessary, although a satisfaction on the records may be required. *Crosby v. Huston*, 1 Texas 239; *Ingle v. Culbertson*, 43 Iowa, 265; *McGregor v. Hall*, 3 St. & P. 397; *Woodruff v. Robb*, 19 Ohio, 212; *Smith v. Doe*, 26 Miss. 291.

³ *Thornton v. Boyden*, 31 Ill. 210; *Lowe v. Grinnan*, 19 Iowa, 197; *Heard v. Baird*, 40 Miss. 796.

⁴ *Pettit v. Johnson*, 15 Ark. 55; *Turner v. Watkins*, 31 Ark. 429; *Morris v. Way*, 16 Ohio, 469; *McIntyre v. Agric. Bank*, 1 Freem. Ch. 105; *Heard v. Baird*, 40 Miss. 796; 2 Jones on Mort., sect. 1769.

refusal of the trustee to serve, the sheriff will be authorized to execute the trust. Or the deed may itself provide for a substitution of trustees. But without express authority the trustee can in no case delegate his power to sell.¹ But the court may, if they deem it wise, compel the trustee to execute the trust instead of appointing another.² This class of deeds of trust is governed by the same equitable rules, which are applied to ordinary trusts, unless there are statutory provisions intended to supersede them. 

§ 369. **Contribution to redeem — General statement. —**

When one of two or more persons jointly liable on a debt pays the whole debt, he has the right to call upon the others for contribution towards such payment in proportion to their several interests in the debt. This liability for contribution is an incident to all contractual obligations, and the same rules of construction apply, whatever may be the nature or origin of the debt. In the present discussion the liability for contribution arises out of the joint obligation of several persons to answer for the mortgage-debt, either in their person or with their interests in the mortgaged premises. It has been explained that when a person is entitled to redeem, and is interested only in a part of the premises, he must pay the entire debt, and, as against the others jointly interested with him, he becomes subrogated to the

¹ *Holden v. Stickney*, 2 McArthur, 141; *Farmers' Loan, etc., Co. v. Hughes*, 11 Hun, 130; *McKnight v. Winner*, 38 Mo. 132; *Whittlesey v. Hughes*, 39 Mo. 13. If there are two or more trustees, upon the death of one, the survivors may execute the power. *Peter v. Beverley*, 10 Pet. 565; *Franklin v. Osgood*, 14 Johns. 527; *Hannah v. Carrington*, 18 Ark. 104

² *Leffler v. Armstrong*, 4 Iowa, 482; *Sargent v. Howe*, 21 Ill. 148; *Drano v. Gunter*, 19 Ala. 731; *Bradley v. Chester Val. R. R.*, 36 Pa. St. 141. Sales under the power are watched and closely scrutinized by the courts, and a court of equity will at any time, at the instance of one interested in the property, direct, restrain, or enforce the exercise of the power. *Goode v. Comfort*, 39 Mo. 325; *Youngman v. Elmira, etc., R. R.*, 65 Pa. St. 278; *Newman v. Jackson*, 12 Wheat. 572; *Brisbane v. Stoughton*, 17 Ohio, 483; *Brown v. Bartee*, 10 Smed. & M. 275; *Kock v. Briggs*, 14 Cal. 256; *Reece v. Allen*, 5 Gilm. 236.

mortgagee, and is equitable assignee of the mortgage, even though the mortgage has been satisfied on the records. He can then, in turn, foreclose the mortgage against them if they refuse to pay their *pro rata* share of the debt. This liability constitutes the right to contribution, as applied to mortgages. It is not a personal liability resting upon the persons interested in the mortgaged premises; their interests are alone liable. Nor can they be compelled to contribute; they have the right to refuse and to surrender their interests to forfeiture under foreclosure.¹ This liability of their interests depends upon the equality or inequality of their respective equities in regard to the mortgage and the debt, and must, therefore, vary according to the relation of the parties between whom the question arises.

§ 370. **Mortgagor v. his assignees.** — Since the mortgagor is personally liable to pay the debt, as a general rule he would have no right to call upon his assignees to contribute, nor could his heirs or devisees claim such a right.² But if the purchaser assumed the mortgagor's liability as a part of the consideration of the conveyance, should the mortgagor be afterwards compelled by the mortgagee to pay the debt, the mortgagor would be subrogated to the rights of the mortgagee under the mortgage, and could enforce it against such purchaser.³ Where there is no

¹ *Cheeseborough v. Millard*, 1 Johns. Ch. 409; *Stevens v. Cooper*, *Ib.* 425; *Lawrence v. Cornell*, 4 Johns. Ch. 542; *Salem v. Edgerly*, 33 N. H. 46; *Stroud v. Casey*, 27 Pa. St. 471; *Chase v. Woodbury*, 6 Cush. 143; *Gibson v. Crehore*, 5 Pick. 146; *Johnson v. Rice*, 8 Me. 167; *Briscoe v. Power*, 47 Ill. 449.

² *Harbert's Case*, 3 Rep. 11; *Chase v. Woodbury*, 6 Cush. 143; *Allen v. Clark*, 17 Pick. 47; *Beard v. Fitzgerald*, 108 Mass. 134; *Clowes v. Dickinson*, 5 Johns. Ch. 235; *Lock v. Fulford*, 52 Ill. 166; *Johnson v. Williams*, 4 Minn. 268; 2 Jones on Mort., sect. 1090.

³ *Cox v. Wheeler*, 7 Paige Ch. 257; *Jumel v. Jumel*, *Ib.*, 591; *Halsey v. Reed*, 9 Paige Ch. 446; *Morris v. Oakman*, 9 Pa. St. 498; *Kinnear v. Lowell*, 34 Me. 299; *Fletcher v. Chase*, 16 N. H. 42; *Sweet v. Sherman*, 109 Mass. 231; *Funk v. McReynolds*, 33 Ill. 481; *Lilly v. Palmer*, 51 Ill. 333; *Baker v. Terrell*, 8 Minn. 199; *Russell v. Pistor*, 7 N. Y. 171.

agreement on the part of the purchaser to pay the debt, if the mortgage is foreclosed, the purchaser can claim from the mortgagor exoneration for the full amount lost by foreclosure.¹

§ 371. **Contribution between the assignees of the mortgagor.** — If the mortgaged property consists of two or more parcels of land, and they are *simultaneously* conveyed by the mortgagor to different persons, and one of the parcels is sold under foreclosure of the mortgage, the assignee or grantee of that parcel has the right to recover from the assignees of the other parcels their *pro rata* share of the debt; the debt being divided among them in proportion to the value of their respective parcels.² But where the assignments have been made *successively*, or at different times, the courts have delivered contrary opinions in respect to their liability for contribution. In most of the States the rule prevails that their liability for contribution to each other is in the inverse order of alienation; in other words, that the equity of the prior purchaser or assignee is superior to that of the subsequent purchaser. So, if the prior purchaser is called upon to redeem, or his lot or parcel is foreclosed, he becomes an equitable assignee of the mortgage, and may enforce it against the subsequent purchasers of the other parcels, who, in order to redeem, must contribute to the full value of their estates in the inverse order of their alienation, the last being required to exhaust his entire interest in the mortgaged property before there can be any

¹ Davis v. Winn, 2 Allen, 111; Downer v. Fox, 20 Vt. 388; Young v. Williams, 17 Conn. 393; Burnett v. Denniston, 5 Johns. Ch. 35; McLean v. Towle, 3 Sandf. Ch. 119; Brainard v. Cooper, 10 N. Y. 356; Flachs v. Kelly, 30 Ill. 462.

² Chase v. Woodbury, 6 Cush. 143; Bailey v. Myrick, 50 Me. 171; Aiken v. Gale, 37 N. H. 501; Stevens v. Cooper, 1 Johns. Ch. 425; Briscoe v. Power, 47 Ill. 448; Bates v. Ruddock, 2 Iowa, 423.

right of contribution against a prior purchaser. If, therefore, the last parcel conveyed is sufficient to satisfy the debt, the prior purchaser takes his estate free from any liability for contribution. The inequality of their equities rests upon the doctrine that inasmuch as, after the first assignment, the estate remaining in the mortgagor became the primary fund for the satisfaction of the debt, the second and other subsequent purchasers took, in respect to their relative liabilities under the mortgage, only such equities as the mortgagor had at the time of the successive conveyances to them.¹ In a few of the States it is held that the equities are equal between assignees of the mortgagor, whether the alienations are simultaneous or successive, and this opinion finds strong support in Judge Story.² But it is believed that the preponderance of authority is in favor of the former theory, and it may be accepted as the prevailing rule in this country.

§ 372. **Contribution between the surety and the mortgagor.** — Where the surety, because of his personal liability,

¹ *Cushing v. Ayer*, 25 Me. 383; *Shepherd v. Adams*, 32 Me. 64; *Brown v. Simons*, 44 N. H. 475; *Aiken v. Gale*, 37 N. H. 501; *Lyman v. Lyman*, 82 Vt. 79; *Gates v. Adams*, 24 Vt. 70; *Bradley v. George*, 2 Allen, 392; *Gill v. Lyon*, 1 Johns. Ch. 447; *Jumel v. Jumel*, 7 Paige Ch. 591; *Patty v. Pease*, 8 Paige Ch. 277; *Nailer v. Stanley*, 10 Serg. & R. 450; *Cowden's Estate*, 1 Pa. St. 267; *Shannon v. Marselis*, 1 N. J. Eq. 413; *Galkill v. Sine*, 13 *Ib.* 400; *Henkle v. Allstadt*, 4 Gratt. 284; *Jones v. Myrick*, 8 Gratt. 179; *Stoney v. Shultz*, 1 Hill Ch. (S. C.) 500; *Norton v. Lewis*, 3 S. C. 25; *Mobile Dock, etc., Co. v. Kuder*, 35 Ala. 717; *Aiken v. Brucey*, 21 Ind. 139; *Johnson v. Williams*, 4 Minn. 268; *Inglehart v. Crane*, 42 Ill. 261; *Niles v. Harmon*, 80 Ill. 396; *Ritch v. Eichelberger*, 13 Fla. 169; *Cumming v. Cumming*, 3 Ga. 460; *Beard v. Fitzgerald*, 105 Mass. 134; *Mason v. Payne*, Walk. (Mich.) 459; *McKinney v. Miller*, 19 Mich. 142; *McCulloun v. Turpie*, 32 Ind. 146; *Worth v. Hill*, 14 Wis. 559; *Spence v. Aldrich*, 15 Wis. 316.

² *Green v. Ramage*, 18 Ohio, 428; *Stanley v. Stocks*, 1 Dev. Eq. 314; *Barney v. Myers*, 28 Iowa 1; *Bates v. Ruddick*, 2 Iowa, 423; *Jobe v. O'Brien*, 2 Humph. 34; *Dickey v. Thompson*, 8 B. Mon. 312; *Story's Eq. Jur.*, sect. 1233 b, and note.

pays the mortgage debt, such payment will operate as an assignment of the mortgage to him, and he can enforce the mortgage to its full value against the mortgagor, his heirs, and even his assignees for value. He is only secondarily liable, the mortgagor, and with him the mortgaged premises, being treated as the primary fund out of which the debt is to be satisfied, and until they have been exhausted the surety can claim complete exoneration.¹ But if the surety be also the mortgagor and the other co-debtor the principal, and the latter pays the debt, he will not be subrogated to the rights of the mortgagee. He is the principal, and can claim contribution or exoneration of no one.²

§ 373. **Between heirs, widow, and devisees of the mortgagor.** — If the mortgagor dies, and the mortgaged premises descend to his widow and heirs, or are devised by will to several parties, their equities being equal, if one of them redeems the mortgage will be assigned to him, and he may foreclose the same against the others unless they contribute their *pro rata* share towards redemption. They are all volunteers, whether they be heirs or devisees, and it is likely — if a part of the mortgaged premises were devised and a part descended to the heirs — there would be a right in favor of the devisee to contribution from the heir, and *vice versa*.³

¹ Cheesebrough v. Milliard, 1 Johns. Ch. 409; Hayes v. Ward, 4 Johns. Ch. 123; Ottman v. Moak, 3 Sandf. Ch. 431; Root v. Baneroft, 10 Metc. 48; Mathews v. Aikin, 1 Comst. 595; Bk. of Albion v. Burns, 45 N. Y. 170; Dearborn v. Taylor, 18 N. H. 153; Ohio Life Ins. Co. v. Winn, 4 Md. Ch. 253; Burton v. Wheeler, 7 Ired. Eq. 217; Bk. of S. C. v. Campbell, 2 Rich. Eq. 179; Billings v. Sprague, 49 Ill. 511; McHenry v. Cooper, 27 Iowa, 146.

² Crafts v. Crafts, 13 Gray, 362; Killborn v. Robins, 8 Allen, 471; Cherry v. Monroe, 2 Barb. Ch. 618.

³ Carll v. Butman, 8 Me. 102; Gibson v. Crehore, 5 Pick. 146; Houghton v. Hapgood, 13 Pick. 158; Swaine v. Perine, 5 Johns. Ch. 490; Foster v. Hilliard, 1 Story, 77; Jones v. Sheward, 2 Dev. & B. Eq. 179; Merritt v. Hosmer, 11 Gray, 296; Bell v. Mayor of N. Y., 10 Paige Ch. 49; Drew v. Rust, 86 N. H. 343; Eaton v. Simonds, 14 Pick. 98.

§ 374. **Between the mortgaged property and the mortgagor's personal estate.** — Upon the death of the mortgagor, leaving the mortgage unsatisfied, a claim for contribution or rather exoneration sometimes exists against the mortgagor's personal estate in favor of the real estate covered by the mortgage. The claim is founded upon the doctrine that the burden was imposed upon the real estate for the benefit of the personal estate, and as between the heirs and next of kin the latter should bear the loss.¹ Only heirs and devisees can claim this right of exoneration. Purchasers from the heirs, and voluntary purchasers from the mortgagor, cannot; nor can the heir or devisee exercise the right if they have parted with the equity of redemption, notwithstanding by the terms of their conveyance they are bound to see to the payment of the mortgage.² It can be enforced only against the personal representatives and residuary legatees. If, therefore, the personal estate has been bequeathed to others in the shape of general or specific legacies, the right to exoneration is lost.³ Nor can the right be exercised if the estate of the mortgagor is insolvent, and whether the estate is insolvent or not, it cannot be enforced against property which has been levied upon, nor will the right of exoneration in any case take precedence to liens held by creditors upon the personal property.⁴ In New York there

¹ *Cope v. Cope*, 2 Salk. 449; *Patton v. Page*, 4 Hen. & M. 449; *Henagan v. Harlee*, 10 Rich. Eq. 285; *Trustees, etc., v. Dickson*, 1 Freem. Ch. 474. But this is not the case, where the mortgage was executed by a prior owner, and the ancestor purchased the property subject to the mortgage. The heir or devisee must, in such a case, pay the mortgage. *Tweddle v. Tweddle*, 2 Bro. Ch. 101; *Cumberland v. Codrington*, *supra*.

² *Goodburn v. Stevens*, 1 Md. Ch. 42; *Lupton v. Lupton*, 2 Johns. Ch. 614; *Cumberland v. Codrington*, 3 Johns. Ch. 229; *Lockhardt v. Hardy*, 9 Beav. 379; *Haven v. Foster*, 9 Pick. 112.

³ *Cope v. Cope*, 2 Salk 449; *Mansell's Estate*, 1 Pars. Eq. Cas. 367; *Mason's Estate*, 4 Pa. St. 497; *Gibson v. McCormick*, 10 Gill & J. 65; *Torr's Estate*, 2 Rawle, 250.

⁴ *Gibson v. Crehore*, 3 Pick. 475; *Church v. Savage*, 7 Cush. 440.

will be no such claim for exoneration, unless the mortgagor has by will expressly made the payment of the debt a charge upon the personality.¹

§ 375. **Special agreements affecting the rights of contribution and exoneration.**— If, in any case where the right of contribution or exoneration exists by law, the parties to the mortgage agree that one or more parcels covered by the mortgage should be released from the incumbrance, such agreement will be enforced between the parties and their subsequent assignees. But in no case will it be permitted to affect or alter the equities of parties who had previously become interested in the mortgaged property.² And if the mortgagee releases one part of the mortgaged premises, after the mortgagor had assigned another part, the mortgagee can only enforce the mortgage against the assignee to an amount determined by the proportion which the value of the entire mortgaged premises bears to the value of such assigned parcel.³

§ 376. **Marshalling of assets between successive mortgages.**— When there are two mortgages upon one parcel of land, and the first mortgage covers another parcel which is not included in the second, if the parcel included in both mortgages is not sufficient to satisfy both debts, equity gives the junior mortgagee the right to call upon the senior mortgagee to exhaust the parcel not covered by both mortgages, before he forecloses against the other parcel. But

¹ *Moseley v. Marshall*, 27 Barb. 42; *Rapalye v. Rapalye*, *ib.* 610; *Wright v. Holbrook*, 32 N. Y. 587.

² *Welsh v. Beers*, 8 Allen, 151; *Bryant v. Damon*, 6 Gray, 564; *Johnson v. Rice*, 8 Me. 157; *The State v. Throup*, 15 Wis. 314; *Cheesebrough v. Mil-liard*, 1 Johns. Ch. 425.

³ *Stevens v. Cooper*, 1 Johns. 425; *Stuyvesant v. Hall*, 2 Barb. Ch. 151; *Johnson v. Rice*, 8 Me. 157; *Parkman v. Welsh*, 19 Pick. 231; *Paxton v. Harrier*, 11 Pa. St. 312; *Inglehart v. Crane*, 42 Ill. 261; *Taylor v. Short*, 27 Iowa, 361; 1 Am. Rep. 280.

equity will not compel the first mortgagee to satisfy himself in that manner, if it would be detrimental to his interests or inconvenient to him. In such a case, however, the court will direct him to assign his mortgage to the junior mortgagee, who may then foreclose against the parcel not covered by his own mortgage.¹

¹ *Lanoy v. Athol*, 2 Atk. 446; *Evertson v. Booth*, 19 Johns. Ch. 486; *Cheesebrough v. Milliard*, 1 Johns. Ch. 412; *Warren v. Warren*, 30 Vt. 530; *Ayres v. Husted*, 15 Conn. 516; *Reilly v. Mayor*, 12 N. J. Eq. 55; *Blair v. Ward*, 10 N. J. Eq. 120; *Baine v. Williams*, 10 Smed. & M. 113; *Inglehart v. Crane*, 42 Ill. 261; *White v. Polleys*, 20 Wis. 505; *Clarke v. Bancroft*, 13 Iowa, 327; *Cowden's Estate*, 1 Pa. St. 274; *Swigert v. Bk. of Ky.*, 17 B. Mon. 285; *Miami Ex. v. U. S. Bank. Wright* (Ohio), 249; *Conrad v. Harrison*, 3 Leigh, 532; *Bk. of S. C. v. Mitchell*, Rice Eq. 389; *Marr v. Lewis*, 31 Ark. 203; 25 Am. Rep. 553.

PART II.

EXPECTANT, EXECUTORY, AND EQUITABLE INTERESTS.

CHAPTER XI. REVERSIONS.

XII. REMAINDERS.

XIII. USES AND TRUSTS.

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CHAPTER XI.

“ REVERSION.”

SECTION 385. Definition.

386. Reversion — Assignable and devisable.

387. Reversion — Descendible to whom.

388. Dower and curtesy in reversions.

389. Rights and powers of the reversion.

§ 385. **Definition.** — A reversion is that estate which remains to an owner of land after he has conveyed away a particular estate. It is a vested estate of future enjoyment, the possession of which is postponed until the determination of the estate granted. There is always a reversion as long as the entire fee has not been exhausted. Thus, after any number of successive estates for life or for years, there is still a reversion left in the grantor. So also is there a reversion after an estate-tail, although there was none after the fee conditional at common law, which the statute “*de donis*” converted into an estate-tail.¹ But where one grants a base or determinable fee, since what is left in him is only a right to defeat the estate so granted upon the happening of a contingency, there is no reversion in him. That is, he has no future vested estate in fee, but only what is called a naked *possibility of reverter*, which is incapable of alienation or devise, although it descends to his heirs.² But

¹ 2 Washb. on Real Prop., 737, 738; 2 Cruise Dig. 335.

² 2 Cruise Dig. 335; 2 Washb. on Real Prop. 739; Ayres v. Falkland, 1 Ld. Raym. 326; Nicoll v. N. Y. & Erie R. R., 12 N. Y. 134; Cook v. Bisbee, 18 Pick. 529; The State v. Brown, 27 N. J. L. 20. But where the particular estate is an estate upon limitation, and more particularly where it is limited by the life of a person, or by a contingent event, which may cause it to last during some life, the estate will not be such a determinable or qualified fee as does not admit of a reversion, although the estate be granted to A. and his heirs. Thus, a limitation to A. and his heirs during the widowhood of B. or the res-

if the determination of such an estate is certain, as where it depends upon an event which is sure to happen, the interest remaining in the grantor would have all the characteristics of a reversion.¹ And a reversion arises where there is a particular estate created by operation of law, as in the case of dower or curtesy.² Not only is there a reversion in the case of an owner of the fee parting with a portion of it, but it exists, whatever may be the estate, whether in tail, for life, or for years, out of which a less estate has been carved.³

§ 386. **Reversion assignable and devisable.** — The reversion may be assigned or devised as freely as an estate in possession — subject, of course, to the prior particular estate. It cannot be conveyed by the common-law conveyance of feoffment, since the reversioner could not deliver actual seisin. But it may be transferred by grant in the

idence of C. in Rome, would be a life-estate, and there would be a reversion left in the grantor instead of a possibility of reverter. 1 Prest. Est. 442; *The State v. Brown*, 27 N. J. L. 20; *McKelway v. Seymour*, 29 N. J. L. 329. A grant to A. and his heirs, as long as a tree stands, would likewise leave a reversion in the grantor. 1 Prest. Est. 440; 1 Washb. on Real Prop. 90. But a grant to A. and his heirs until B. returns from Rome would be a fee upon limitation, and since it is doubtful if the contingency will happen, and if it does not, the estate becomes an absolute fee in the grantee, the grantor has only a possibility of reverter, and not a reversion. 1 Washb. on Real Prop. 90; 1 Prest. Est. 441.

¹ *The State v. Brown*, 27 N. J. L. 20; *McKelway v. Seymour*, 29 N. J. L. 329.

² It is so far a reversion that if the reversioner should die during the lifetime of the tenant in dower or curtesy, the wife or husband, respectively, of the reversioner would have no dower or curtesy in such lands. *Dos de dote peti non debet*. *Cook v. Hammond*, 4 Mason, 485; *Geer v. Hamblin*, 1 Me 54; *Dunham v. Osborn*, 1 Paige Ch. 634; *Reynolds v. Reynolds*, 5 Paige Ch. 161; *Safford v. Safford*, 7 Paige Ch. 259; Co. Lit. 31 a; 4 Kent's Com. 65; 2 Washb. on Real Prop. 740. But if the widow of the ancestor has not had her dower set out, when the widow of an heir demands an assignment, the latter widow may have her dower set out in all the property, subject, however, to be subsequently defeated *pro tanto* by the assignment of dower to the senior widow. 1 Cruise Dig. 164; *Hitchens v. Hitchens*, 2 Vern. 405; *Geer v. Hamblin*, *supra*; *Elwood v. Klock*, 13 Barb. 50; *Robinson v. Miller*, 2 B. Mon. 288.

³ 2 Washb. on Real Prop. 739; 2 Cruise Dig. 335, 336.

nature of a release, or by any of the deeds operating under the Statute of Uses.¹ At common law it was necessary to obtain the consent of the tenant of the particular estate for the effective transfer of the reversion. This was called the attornment, a mutual obligation upon tenants and reversioner which prevailed under the feudal system. But it was abolished by statute in the reign of Queen Anne.² But a reversion cannot be granted to commence in the future, any more than an estate in possession, except by way of a future use.³ The reversion must be so assigned that the estate of the grantee shall take effect in possession immediately after the determination of the preceding estate in possession.

§ 387. **Reversion descendible to whom.**—Under the common-law maxim of descent, *seisina facit stipitem non jus*, the reversion can only descend to the heirs of the person who was last *seised* in fact. If a person grants a life estate or other freehold estate less than a fee, his heirs could inherit the reversion, but if they should in turn die before the determination of the particular estate of freehold, only those who can trace their descent as heir from the grantor could inherit from such heirs.⁴ If, however, the reversion

¹ 2 Washb. on Real Prop. 738. The statement in the text, that a reversion cannot be conveyed by feoffment, is correct only when the particular estate already granted is a freehold. If the particular estate is less than a freehold, an estate for years, the actual seisin is in the reversioner, and he may make a conveyance of his estate by feoffment. Co. Lit. 48 b; Williams on Real Prop. 242.

² 2 Washb. on Real Prop. 738; Williams on Real Prop. 247. This statute is generally recognized as in force in the United States. See *Farley v. Thompson*, 15 Mass. 26; *Burden v. Thayer*, 13 Mete. 78; *Baldwin v. Walker*, 21 Conn. 168; *Coker v. Pearsall*, 6 Ala. 542.

³ 2 Washb. on Real Prop. 738; 1 Prest. Est. 89; 2 Cruise Dig. 336; Jones v. Roe, 3 T. R. 93.

⁴ 2 Washb. on Real Prop. 740, 741; 4 Kent's Com. 385; Williams on Real Prop. 100, 101; 3 Cruise Dig. 142; *Cook v. Hammond*, 4 Mason, 467; *Miller v. Miller*, 10 Mete. 393.

is assigned or devised, or is sold under levy of execution, such purchaser or devisee would constitute a new stock of descent, and his heirs would take the reversion as if it had been an estate in possession.¹ The above rule only applies where the particular estate is a freehold. If it be a term of years — as will be more fully explained in treating of remainders — the tenant holds the possession as a *quasi-bailee* of the reversioner, the latter is deemed to be actually seised; and so also would be his heirs before the expiration of the estate for years.² But this common-law doctrine has been abrogated in most, if not all, the States of this country, so that it possesses at present but little practical importance.³

§ 388. **Dower and curtesy in reversions.** — The wife or husband of the reversioner will not have, respectively, dower or curtesy in the reversion unless the particular estate is less than a freehold, or unless it determines during the life-time of the reversioner. The vesting of these estates requires actual seisin in the husband or wife, and, as has been shown in the previous paragraph, the reversioner is not actually seised when the particular estate is a freehold.⁴

§ 389. **Rights and powers of the reversioner.** — It may be generally stated, that the reversioner has all the powers

¹ 1 Washb. on Real Prop. 741; Williams on Real Prop. 100, 101; 4 Kent's Com. 386.

² Co. Lit. 15 a; 2 Washb. on Real Prop. 741.

³ 2 Washb. on Real Prop. 741. See *post*, Chapter on Descent.

⁴ 2 Washb. on Real Prop. 741; 2 Cruise Dig. 338; 4 Kent's Com. 39; Brooks v. Everett, 13 Allen, 458; Eldredge v. Forrestall, 7 Mass. 253; Robinson v. Codman, 1 Sumn. 130; Fisk v. Eastman, 5 N. H. 240; Otis v. Parshley, 10 N. H. 403; Dunham v. Osborn, 1 Paige Ch. 634; Durando v. Durando, 23 N. Y. 331; Shoemaker v. Walker, 2 Serg. & R. 556; Arnold v. Arnold, 8 B. Mon. 202. And if the husband sells his reversion during the continuance of the prior freehold estate, the wife loses all possibility of acquiring the dower right by the determination of the particular estate. Gardner v. Greene, 5 R. I. 104; Apple v. Apple, 1 Head, 348.

and rights which the tenant of an estate in remainder would have. He can maintain his action for waste against strangers as well as the tenant of the particular estate, and has a right to receive rents accruing from such tenant; and so will his assignee, if the rent is not reserved or granted away to another.¹ The same doctrine of merger applies if the particular estate and the reversion become united in the same person. And if the tenant of the particular estate is disseised, it will have no more effect upon the reversion than it would have upon a remainder. For any further explanation of the rights and powers of reversioners, reference may be had to the chapter on Remainders. The subject is there presented in detail as to remainder-men, and as the rights and powers of remainder-men and reversioners are identical, it requires but one statement of them.²

¹ Co. Lit. 143 a; 2 Washb. on Real Prop. 742-744; *Jesser v. Gifford*, 4 Burr. 2141; *Bartlett v. Perkins*, 13 Me. 87; *Simpson v. Bowden*, 33 Me. 549; *Livingston v. Haywood*, 11 Johns. 429; *Burden v. Thayer*, 3 Metc. 76; *Wood v. Griffin*, 46 N. H. 239; *Ripka v. Sergeant*, 7 Watts & S. 9. See *ante*, sects. 180, 191, 192.

² See *post*, chap. xii. Apart from the difference in the manner, in which the remainder and the reversion are created, Mr. Williams says: "A remainder chiefly differs from a reversion in this, — that between the owner of the particular estate and the owner of the remainder (called the remainder-man) no tenure exists. They both derive their estates from the same source, the grant of the owner in fee simple; and one of them has no more right to be lord than the other." Williams on Real Prop. 250.

CHAPTER XII.

REMAINDERS.

- SECTION I. *Of remainders in general and herein of vested remainders.*
II. *Contingent remainders.*
III. *Estates within the rule in Shelley's Case.*

SECTION I.

OF REMAINDERS IN GENERAL AND HEREIN OF VESTED REMAINDERS.

- SECTION 396. Nature and definition of remainders.
397. Kinds of remainders.
398. Successive remainders.
399. Disposition of a vested remainder.
400. Relation of tenant and remainder-man.
401. Vested and contingent remainders further distinguished — Uncertainty of enjoyment.
402. Same — Remainder to a class.
403. Same — After the happening of the contingency.
404. Cross remainders.

§ 396. *Nature and definition of remainders.* — It will have been already observed from the preceding pages, that at common law the only mode of transferring freehold estates in possession was by a certain ceremony known as *livery of seisin*, and that there could be but one actual seisin, which always accompanied the freehold estate in possession.¹ The livery of seisin being a manual delivery of possession, and the title passing *in presenti* by virtue of such delivery, it is but a natural consequence that, according to the common law, no freehold estate can be created to commence *in futuro*, conveying a present title to the same. We have seen, though, in the preceding chapter on Reversions, that an es-

¹ See *ante*, sect. 24.

tate in possession less than a fee may be granted, leaving a reversion in the grantor, which he could subsequently assign by deed of grant.¹ The difficulty experienced at common law in creating future estates lay in the fact, that they had no mode of conveyance which did not operate by transmutation of possession. It was necessary that immediate possession should accompany the creation or transfer of the title.² In fact, livery of seisin was nothing more than the delivery of the possession of a freehold. If, therefore, a particular estate in possession had already been granted, or was conveyed at the same time with the future estate, the obstacle in the way of creating the latter was removed. If the particular estate was granted by a prior deed, the future estate was a reversion in the grantor which could afterward be conveyed by grant. But if it was granted at the same time as the future estate, and by the same deed, the future estate was called a remainder. A remainder is, therefore, a future estate in lands, which is preceded and supported by a particular estate in possession, which takes effect in possession immediately upon the determination of the prior estate, and which is created at the same time and by the same conveyance.³ It follows, therefore, from this definition, that a remainder can only be acquired by purchase; it never vests by descent.⁴ Nor can a remainder be supported by an estate which is created by operation of law. The future

¹ See *ante*, sect. 386.

² See *post*, sects. 769, 770, 771; 2 Washb. on Real Prop. 536, 538, 539; Co. Lit. 217 a.

³ 2 Washb. on Real Prop. 539; 2 Bla. Com. 163; Co. Lit. 143. See also *Doe v. Considine*, 6 Wall. 474; *Brown v. Lawrence*, 3 Cush. 390; *Phelps v. Phelps*, 17 Md. 134; *Booth v. Terrell*, 16 Ga. 20.

⁴ *Dennett v. Dennett*, 40 N. H. 504; see *Langdon v. Strong*, 2 Vt. 254. In the same manner, there must be a conveyance of the prior particular estate. A man cannot grant a remainder, reserving to himself a prior estate for life. The grant, if it took effect at all, would create in the grantee a springing use and not a remainder. *Bissell v. Grant*, 35 Conn. 297. See also *post*, sect. on Springing Uses, Chapter XIII.

estate, which vests in the heirs upon the determination of the widow's dower, or the husband's curtesy, is not a technical remainder, but a reversion.¹ If the future estate does not take effect in possession immediately upon the expiration of the prior or particular estate (the prior estate is called *particular*, derived from the latin *particula*, part or parcel), it is not a remainder, and if it cannot take effect as an assigned reversion, a future use or an executory devise — which will be explained hereafter² — it will be void, and the conveyance will fail.³ But the refusal of a devisee to accept a particular estate will not defeat the devise of the remainder-man. The remainder-man would in such a case take from the death of the testator, the devise of the particular estate being treated as having lapsed. Nor will the disaffirmance by an infant tenant for life have any effect upon the validity of the remainder. But if the particular estate is void, through some quality annexed to the estate in its inception as, by entry of the grantor for condition broken, the remainder will also fail.⁴

§ 397. **Kinds of remainders.** — Remainders are divided into two classes, *vested* and *contingent*. A vested remainder

¹ Geer v. Hamblin, 1 Me. 54; Cook v. Hammond, 4 Mason, 485; Reynolds v. Reynolds, 5 Paige, 167; Safford v. Safford, 7 Paige Ch. 259; Robinson v. Miller, 2 B. Mon. 288; Elwood v. Klock, 13 Barb. 50; Hitchens v. Hitchens, 2 Vern. 405; 1 Cruise Dig. 164; 4 Kent's Com. 65; Co. Lit. 31 a. See *ante*, sect. 385.

² See *post*, sects. on Contingent, Springing and Shifting Uses in Chapter XIII.

³ 2 Washb. on Real Prop. 540; 1 Prest. Est. 217; Williams on Real Prop. 249-251; Wilkes v. Lion, 2 Cow. 333.

⁴ 2 Washb. on Real Prop. 555; Co. Lit. 298 a; Thompson v. Leach, 2 Salk. 576; Prescott v. Prescott, 7 Metc. 141; Macknet v. Macknet, 24 N. J. Eq. 277; Lawrence v. Hebbard, 2 Bradf. 250; Goodall v. McLean, 2 Bradf. 306; Yeaton v. Roberts, 28 N. H. 459; Augustus v. Seabolt, 3 Metc. 161. But the statement in the text, that the entry of the grantor, for the breach of a condition annexed to the particular estate, would defeat the remainder, applies only to common-law remainders. A limitation to take effect upon the breach of a condition may be valid as an executory devise or as a shifting use. See *ante*, sect. 281, and *post*, sects. 418, 536, 537.

is a present vested right to the future enjoyment of the land. In a vested remainder only the possession is postponed. It is, therefore, a *vested* and *executory* estate.¹ A contingent remainder is one in which both the title and the possession are postponed. The vesting of the title depends upon the happening of an uncertain event which may not happen at all, or at a time subsequent to the determination of the particular estate. The possession depends upon the vesting of the title, and as the estate must take effect in possession immediately upon the expiration of the particular estate, it will fail if the contingency does not occur before that event.² And at common law a remainder to a child

¹ Croxall v. Shererd, 5 Wall. 288; Doe v. Considine, 6 Wall. 474; Brown v. Lawrence, 3 Cush. 390; Blanchard v. Blanchard, 1 Allen, 227; Hill v. Baron, 106 Mass. 578; Leslie v. Marshall, 31 Barb. 564; Moore v. Lyons, 25 Wend. 119; Gourley v. Woodbury, 42 Vt. 395. Mr. Preston's definition is: "It is the present capacity of taking effect in possession, if the possession were fallen." 1 Prest. Est. 70.

² 2 Washb. on Real Prop. 542; Doe v. Morgan, 3 T. R. 764; Purefoy v. Rogers, 2 Lev. 39; Hawley v. James, 5 Paige Ch. 466; Moore v. Lyons, 25 Wend. 144; Williamson v. Field, 2 Sandf. Ch. 553; Price v. Sisson, 13 N. J. L. 176. There have been various tests suggested for determining, whether in a given case a future estate is a vested or contingent remainder, and the more common one is that given by Mr. Fearne, viz.: "The present capacity of taking effect in possession, if the possession were to become vacant, * * * distinguishes a vested remainder from one that is contingent." Fearne Cont. Rem. 216; 2 Cruise Dig. 200. This was a reliable test, if it was understood that it mattered not in what way or by what means the prior particular estate is determined, whether by forfeiture, merger, or disseisin, or by the natural termination of the estate. But since at the present day, in a number of the States, the defeat of the prior estate in any other way, except by this natural termination, will not avoid the contingent remainder depending upon it, this test is no longer reliable, and another must be found. The following is suggested as a reliable test, viz.: the present capacity to convey an absolute title to the remainder. This test would, however, give rise to a qualification, where the remainder is to a class, and some of the class are not yet *in esse*. The remainder, so far as those *in esse* are concerned, is held to be vested (see *post*, sect. 402), while such remainder-men could not convey an absolute title, thus excluding the afterborn members of the class from their right in the remainder, although they can convey an absolute title to *their own* interest in it.

en ventre sa mere would be defeated if it was not born before the termination of the particular estate. This rule, however, has now in most of the States been changed by statute, and an unborn child after conception is considered as sufficiently a living being, in order to take an estate.¹ A contingent remainder is both contingent and executory. As long as there is some one in being who can take and hold the actual seisin, no violation of the common-law rule, which requires an ascertained tenant of the *præcipe*, will be committed, whether the title to the remainder vests immediately or whether its vesting is postponed to some future time. In this way is the validity of a contingent remainder explained. The contingency may be the birth of the person who is to take, as well as any other uncertainty. But for the support of a contingent remainder the particular estate must be a freehold; while in the case of a vested remainder the particular estate may be only a term of years. The reason for this difference lies in the fact that the tenant for years has only a chattel interest, the possession of which he acquires as a *quasi-bailee* of the tenant in reversion. He does not take, and cannot hold, the actual seisin in his own right. If the remainder is contingent there is no definitely ascertained person who can take the legal seisin, which, together with the actual possession of the tenant for years, as his bailee, will constitute the complete and lawful seisin to the land.² An apparent exception to this rule, requiring

¹ *Reeve v. Long*, 1 Salk. 227; 4 Kent's Com. 249. Statutes, changing the common law in this respect, are to be found in Arkansas, California, Georgia, Maryland, Massachusetts, Missouri, New York, Ohio, Virginia and Wisconsin. 2 Washb. on Real Prop. 595; *Crisfield v. Storr*, 36 Md. 129; 11 Am. Rep. 480.

² Co. Lit. 143 a; *Fearne Cont. Rem.* 285; 2 Washb. on Real Prop. 538, 543; *Williams on Real Prop.* 252; *Doe v. Considine*, 6 Wall. 474; *Brodie v. Stephens*, 2 Johns. 289; *Corbet v. Stone*, T. Raym. 151; 2 Bla. Com. 171. In New York, Michigan, Wisconsin, Minnesota, it is provided by statute that a contingent remainder may be limited to take effect at the termination of an estate for years. 2 Washb. on Real Prop. 594, 595. And in very many of the

the particular estate to be a freehold, is met with in limitations like the following: An estate is given to A. for eighty years, if he shall so long live, with a contingent remainder at his death. This has been held to be a good contingent remainder, since it is so extremely unlikely that A. will live out the term that it may be considered as practically an estate for life. No particular number of years is required to support this kind of limitation, and it is apprehended that the required number would vary in each case according to the chances of life of the tenant of the particular estate, a greater number being required if the tenant of the particular estate is a young person than if he is old.¹ Any particular estate for years is sufficient if the contingent remainder is not a freehold. In that case the seisin is still in the grantor.² But the particular estate must in no case be less than an estate for years. A tenancy at will, at sufferance, or from year to year, will not support a remainder; such estates are too uncertain as to their duration.

§ 398. **Successive remainders.** — As long as the entire fee is not granted away, there may be any number of estates limited in remainder, following one after another, provided they are so granted that one will vest in possession immediately upon the termination of the preceding remainder. If any time be allowed to elapse between their vesting in possession, the estates cannot take effect as remainders. Thus the conveyance may be to A. for life or for years, to B. for life or years, to C., and so on indefinitely, provided

States terms of years of long duration are now declared by statute to have all the properties of a freehold estate. 1 Washb. on Real Prop. 463.

¹ 2 Cruise Dig. 243; 2 Washb. on Real Prop. 585; *Napper v. Sanders*, Hutt. 118; *Lethieullier v. Tracy*, Amb. 204; s. c., 3 Atk. 774; *Doe v. Ford*, 2 E. & B. 970; *Weale v. Lower*, Pollexf. 67; *Fearne Cont. Rem.* 20-22; 1 Prest. Est. 81.

² 2 Cruise Dig. 244; *Fearne Cont. Rem.* 285; *Corbet v. Stone*, T. Raym. 151; 2 Washb. on Real Prop. 585, 586.

no one is given the fee in remainder.¹ As soon, however, as the fee is assigned — there being nothing in the nature of an estate left in the grantor — he can create no more remainders. It is, therefore, a cardinal rule that no remainder can be limited after a fee; or, in other words, where there is no reversion there can be no remainder.² And this is true, even though the fee be base or qualified, as in the case of a fee upon condition. There is left in the grantor

¹ 2 Washb. on Real Prop. 555.

² 1 Eq. Cas. Abr. 185; 2 Cruise Dig. 203; Att'y-Gen. v. Hall, Fitzg. 314; *Ide v. Ide*, 5 Mass. 500; *McLean v. McDonald*, 2 Barb. 534; *Jackson v. DeLancy*, 13 Johns. 557; *Bowman v. Lobe*, 14 Rich. Eq. 271. But such a limitation could take effect as an executory devise, if it appeared in a will. *Doe v. Glover*, 1 C. B. 448; *Nightingale v. Burrell*, 15 Pick. 104, 111; *Andrews v. Roye*, 12 Rich. 544; *Marks v. Marks*, 10 Mod. 423; *Purefoy v. Rogers*, 2 Wms. Saund. 388 a, note; *Hatfield v. Sueden*, 42 Barb. 65; s. c., 54 N. Y. 285; *Brightman v. Brightman*, 100 Mass. 238. But if the first devisee has an absolute power of disposal, and the limitation over is to operate only upon what is left at his death, the limitation cannot take effect either as a contingent remainder or as an executory devise. *Ide v. Ide*, 5 Mass. 500; *Ramsdell v. Ramsdell*, 21 Me. 288; *Jones v. Bacon*, 68 Me. 34; 28 Am. Rep. 1; *Smith v. Bell*, 6 Pet. 68; *Sears v. Russell*, 8 Gray, 100; *Burbank v. Whitney*, 24 Pick. 146; *Hale v. Marsh*, 100 Mass. 468; *Jackson v. Bull*, 10 Johns. 19; *Jackson v. Robins*, 15 Johns. 169; s. c., 16 Johns. 568; *McKenzie's Appeal*, 41 Conn. 607; 19 Am. Rep. 525; *Newland v. Newland*, 1 Jones L. 463; *McRee's Adm'rs. v. Means*, 34 Ala. 349; *Norris v. Hensley*, 27 Cal. 439; *Flinn v. Davis*, 18 Ala. 132; *Doe v. Stevenson*, 1 C. B. 448; *Bourn v. Gibbs*, 1 Russ. & M. 615; *Rona v. Meier*, 47 Iowa, 607; 29 Am. Rep. 493. A careful analysis of these cases will, however, reveal the fact that the first limitation has been enlarged into a fee, under the operation of the rule in the law of powers (see *post*, Chapter XV., on Powers), that an unlimited power of disposal annexed to a devise general of the estate without words of limitation, will enlarge the estate devised into a fee, or an estate in fee is expressly given, and in either case the limitation over is *precatory* instead of being *mandatory*. Where the prior limitation is expressly for life, or the limitation over is explicit and mandatory, not in the nature of a request, that the devisee *in presenti* shall leave what he has not disposed of to the persons, it will not only be a good limitation over, but, if the prior limitation is an estate for life or any other estate less than a fee, it will be a *vested remainder*. *Gibbins v. Shepard*, 125 Mass. 541; *Burleigh v. Clough*, 52 N. H. 267; 13 Am. Rep. 23; *Mandlebaum v. McDonnell*, 29 Mich. 78; 18 Am. Rep. 61. In Indiana, Michigan, Minnesota, and Wisconsin, by statute, a remainder can be limited to take effect after a fee or by abridging the preceding estate. 2 Washb. on Real Prop. 54.

after such an estate only a *possibility of reverter*, which cannot be assigned, either as a reversion or as a remainder.¹ But where a remainder is given to trustees and their heirs, since the duration of the trustee's estate is always limited by the requirements and necessities of the trust, if the performance of the trust does not require a fee, and the estate is therefore determinable, a remainder may be limited to take effect after the determination of the trust-estate. This constitutes an exception to the general rule, and is only applicable to remainders in trust.² Estates are sometimes created to take effect after, or in derogation of, the preceding estate in fee, but they are not common-law remainders. At common law such an estate is impossible; they are called conditional limitations, and operate under the Statute of Uses as a shifting use, or under the Statute of Wills as an executory devise.³ So also was it impossible to create a remainder after a fee conditional at common law. But wherever that estate has been converted into a fee tail, a remainder is possible, as has been explained in the chapter on Reversions.⁴

§ 399. **Disposition of a vested remainder.** — A vested remainder is capable of alienation by any mode of con-

¹ 2 Washb. on Real Prop. 540, 541; *Doe v. Selby*, 2 B. & C. 930; *Willion v. Berkley*, Plowd. 235; *Seymour's Case*, 10 Rep. 97; *Wimple v. Fonda*, 2 Johns. 288; *Buist v. Dawes*, 4 Strobb. Eq. 37.

² *Lethieullier v. Tracy*, 3 Atk. 774. See *post*, sect. IV, Chapter XIII.

³ 2 Washb. on Real Prop. 544, 545; 1 Prest. Est. 91; *Cogan v. Cogan*, Cro. Eliz. 360; *Proprietors Brattle Sq. Church v. Grant*, 3 Grav. 149; *Horton v. Sledge*, 29 Ala. 495. See *post*, Chapter XIII, Sect. III, and Chapter XIV.

⁴ 2 Washb. on Real Prop. 546; *Wilkes v. Lion*, 2 Cow. 393; *Hall v. Priest*, 6 Gray, 18. The remainder after an estate tail was liable to be defeated by the common recovery, instituted by the tenant in tail for the purpose of cutting off the entail. *Williams on Real Prop.* 253; 1 Spence Eq. Jur. 144; 2 Prest. Est. 460; *Page v. Hayward*, 2 Salk. 570. The remainder after an estate tail has this further peculiarity, that the estate tail will not merge in it, if the two should come together in the tenant in tail. *Wiscot's Case*, 2 Rep. 61; *Roe v. Baldwere*, 5 T. R. 110; *Poole v. Morris*, 29 Ga. 374.

veyance which does not require livery of seisin, and even with livery, where the particular estate is not a freehold, and the consent of the tenant to entry upon the land for that purpose is obtained. It may be devised, or assigned in whole, or carved up into a number of smaller estates, and may be conveyed upon trusts, or made to vest upon some future contingency, provided no estate is thereby made to commence *in futuro*, without a preceding estate to support it.¹

§ 400. **Relation of tenant and remainder-man.** — There is no tenure existing between the remainder-man and the tenant of the particular estate. The tenant can have no claim on the latter for any improvements made by him. If the improvement is not of such a nature as to give him the right of removal under the law of fixtures, it becomes a part of the soil, and passes with it to the remainder-man upon the termination of the particular estate.² The tenant cannot do anything to defeat a vested remainder; a disseisin of the tenant affects the remainder in no manner. Nor can the possession of the tenant be deemed adverse to the remainder-man, either for the purpose of preventing the latter

¹ 2 Washb. on Real Prop. 553; 1 Prest. Est. 75; *Pearce v. Savage*, 45 Me. 101; *Blanchard v. Brooks*, 12 Pick. 47; *Gliddon v. Blodgett*, 38 N. H. 74; *Jackson v. Sublett*, 10 B. Mon. 467; *Fearne Cont. Rem.* 216; *Williams on Real Prop.* 252. In Alabama, New York, Michigan, Wisconsin, Minnesota, Indiana, Iowa, Mississippi, Missouri, Texas, Virginia, Kentucky, Illinois, a legal estate may be created by deed to commence in the future, without a preceding estate to support it. 2 Washb. on Real Prop. 592, 593. In those States, therefore, a future estate may be disposed of in such a manner, that it is to vest in the purchaser at some future day, and in the meanwhile remain vested in the original remainder-man.

² 2 Washb. on Real Prop. 554; *Elwes v. Mawe*, 3 East, 38; *s. c.*, 2 Smith's Ld. Cas. 212; *Madigan v. McCarthy*, 108 Mass. 376; 11 Am. Rep. 371; *Ford v. Cobb*, 20 N. Y. 344; *Tift v. Horton*, 53 N. Y. 377; 13 Am. Rep. 537; *Thurston v. Dickinson*, 2 Rich. Eq. 317; see *ante*, sect. 6. Nor can the tenant of the particular estate enter into any agreement in respect to the property, which will bind the remainder-man. *Hill v. Roderick*, 4 Watts & S. 221.

from conveying his interest, or with a view to defeat it under the Statute of Limitations, unless the possession be continued after the termination of the particular estate. The Statute of Limitations does not begin to run, until the remainder takes effect in possession.¹ And if the tenant or a stranger commits waste upon the land, or does any injury to the inheritance, the remainder-man has his own action for damages against the wrong-doer.²

§ 401. **Vested and contingent remainders further distinguished — Uncertainty of enjoyment.** — No uncertainty of enjoyment will render the remainder contingent. The contingent or vested character of the remainder is only determined by the uncertainty, which attends the vesting of the right to the estate.³ But sometimes it is difficult to de-

¹ 2 Wash. on Real Prop. 555; see *Grout v. Townsend*, 2 Hill, 554.

² *Chase v. Hazelton*, 7 N. H. 176; *Van Deusen v. Young*, 29 N. Y. 9; *Brown v. Bridges*, 30 Iowa, 145. But no one, whose reversionary interest is a contingent remainder or an executory devise, can maintain a legal action of waste against the tenant of the particular estate, although his interests in the estate may be protected by injunction from destruction by the waste of the particular tenant. *Hunt v. Hall*, 37 Me. 363. And, unless changed by statute, the remainder-man can maintain the technical action of waste, only when he has the immediate estate in remainder. If there is an intermediate estate in remainder between him and the tenant of the particular estate, he could only maintain an action in the case on the nature of waste. *Williams v. Bolton*, 3 P. Wms. 298; Co. Lit. 218 b, n. 122; 1 Washb. on Real Prop. 154. But the distinction between *trespass* and *case* has been abolished in many of the States, and certainly in all the States which have adopted the code of New York. And for acts of waste by strangers the tenant of the particular estate may be held liable to the remainder-man or reversioner, if the waste results through his negligence in protecting the estate from the trespasses of strangers. Co. Lit. 54 a; *Attersol v. Stevens*, 1 Taunt. 198; *Fay v. Brewer*, 3 Pick. 203; *Wood v. Griffin*, 46 N. H. 237; *Cook v. Champlain Trans. Co.*, 1 Denio, 91; *Austin v. Hudson R. R. Co.*, 25 N. Y. 341.

³ "The present capacity of taking effect in possession, if the possession were now to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent." *Fearne Cont. Rem.* 216. See also 4 Kent's Com. 202; *Croxall v. Shererd*, 5 Wall. 288;

termine whether the contingency refers to the enjoyment or to the vesting of the title. Thus, in a devise to A. and B. for eight years, remainder to the testator's executors until H. B. arrives at twenty-one years, and when he should come of age, then that he should enjoy the same to him and his heirs forever. H. B. died during minority. It was held that only the enjoyment was postponed to his arrival at majority, and that the remainder was vested and descended to his heirs.¹ Not only will the mere uncertainty of enjoyment not make the remainder contingent, but the remainder will be a good vested one, although it may be absolutely impossible for the remainder-man ever to enjoy the possession of it. Thus a grant to A. for one thousand years, remainder to B. for life; B. is sure to die before the natural expiration of A.'s estate, but the remainder, nevertheless, is good, although it ends with B.'s death. So also would this be the case where the grant was to A. for life, remainder to B. during the life of A. B. could only enjoy his remainder in the event that A.'s estate was destroyed by forfeiture, escheat or merger, and it may not be defeated at all. Nevertheless, B.'s estate is a vested remainder. And if the remainder to B. were in fee, although he would never be able to enjoy it, he could convey it to others or devise it, and if he died without making a disposition of it, it would descend to his heirs.² But wherever the title vests only upon the happening of a future contingency, whatever generally may be that contingency — whether it be the birth of the re-

Pearce v. Savage, 45 Me. 101; *Brown v. Lawrence*, 3 Cush. 390; *Williamson v. Field*, 2 Sandf. Ch. 533; *Allen v. Mayfield*, 20 Ind. 293; *Marshall v. King*, 24 Miss. 90.

¹ *Boraston's Case*, 3 Rep. 19; *Manning's Case*, 8 Rep. 187 b; *Goodtitle v. Whitby*, 1 Burr. 233; *Tomlinson v. Dighton*, 1 P. Wms. 17; *Doe v. Lea*, 3 T. R. 41. See also *Doe v. Moore*, 14 East, 601; *Furness v. Fox*, 1 Cush. 134; *Blanchard v. Blanchard*, 1 Allen, 223; *Manice v. Manice*, 43 N. Y. 380.

² 2 Washb. on Real Prop. 547; *Williams on Real Prop.* 252; *Fearne Cont. Rem.* 216; *Parkhurst v. Smith*, Willes, 338; *Williamson v. Field*, 2 Sandf. Ch. 533; *Mandersson v. Lukens*, 23 Pa. St. 31.

mainder-man or some collateral event — the remainder is contingent, and there is no present vested right. And it has been held by the New Hampshire courts that a grant to A. for life, remainder after his death to B., would make the remainder to B. contingent, since by the terms of the conveyance B. was only to take the estate after the death of A., and A.'s estate may be defeated before its natural termination by forfeiture, or merger into the inheritance.¹ But this view is generally rejected by the authorities, which hold that an express and explicit reference to such a contingency is necessary to make the remainder contingent.²

¹ *Hall v. Nute*, 38 N. H. 422; *Hayes v. Tabor*, 41 N. H. 521. In *Hall v. Nute*, the devise was to Esther Tuttle, "to hold as long as she lives a natural life; also the land which I have given to Esther Tuttle as long as she lives, after her decease I give and bequeath the same to my son, William Tuttle, as long as he lives a natural life, and no longer; and, after his decease, I give and bequeath the same to his heirs and assigns." The court say: "William Tuttle, under the devise, could not take the estate limited to him in remainder until the death of Esther Tuttle. If her estate were destroyed during life, by forfeiture, or by surrender and merger in the inheritance, the remainder limited to William Tuttle could never vest in possession, though he might survive his mother, because there would be no particular estate to support the remainder." The court rest their opinion on the authority of *Doe v. Holmes*, 2 W. Bl. 777, in which the devise was "to J. S. for the term of his natural life, and after his decease to the heirs male and female of J. L." This was held to be a contingent remainder. But it is readily observed by the reader that the contingency arose from the uncertainty of the remainder-men, being described as the heirs of a living person.

² 4 Kent's Com. 202; *Carter v. Hunt*, 40 Barb. 89; *Williamson v. Field*, 2 Sandf. Ch. 533; *Moore v. Lyons*, 25 Wend. 144; *Price v. Sisson*, 13 N. J. 168. The presumption is always in favor of the remainder being vested, and, especially in devises, the remainder will not be held to be contingent, unless it is the apparent intention of the testator that the remainder shall be contingent. If there is an express declaration that the remainder man shall only take the estate at the natural termination of the particular estate, and at no other time, the remainder will be necessarily contingent. See *Sinton v. Boyd*, 19 Ohio St. 57; 2 Am. Rep. 369. But it is so extremely unlikely that the testator, in a will like the New Hampshire case, could have contemplated the possible forfeiture or merger of the particular estate, and have intended that the remainder-man should not take in such an event; that such a construction would be maintained only upon the strongest proof that such was the intention of the testator.

Whenever there is a doubt as to whether a remainder is vested or contingent, the courts always incline to construe it a vested estate.¹ Thus, in a devise to A. for life, remainder to the surviving children of J. S., there being a doubt whether the surviving refers to the death of the testator, or of A., and the latter construction would make the remainder contingent, the court held that it referred to the death of the testator, and that, therefore, the remainder was vested.² and such will always be the leaning of the courts where the doubt cannot otherwise be removed.

§ 402. **Same — Remainder to a class.** — The general rule is that a remainder is contingent, if the persons who are to take are not *in esse*, or are not definitely ascertained. But where the remainder is limited to a class, some of whom are not *in esse*, the remainder has repeatedly been held to be vested — liable, however, to open and let in those who were afterwards born during the continuance of the particular estate. It is questionable whether a simple limitation in remainder to a class, as to children, will open to let in after-born children, if there are some *in esse* who can take.

¹ Doe v. Perryn, 3 T. R. 484; Doe v. Prigg, 8 B. & C. 231; Duffield v. Duffield, 1 Dow & C. 311; Croxall v. Shererd, 5 Wall. 287; Fay v. Sylvester, 2 Gray, 171; Doe v. Provoost, 4 Johns. 61; Moore v. Lyons, 25 Wend. 119; Den v. Demarest, 1 N. J. 525.

² Doe v. Prigg, 8 B. & C. 231; Smither v. Willock, 9 Ves. 233; Eldridge v. Eldridge, 9 Cush. 516; Moore v. Lyons, 25 Wend. 119; Chew's App., 37 Pa. St. 23. And very often a remainder will be construed to be a vested estate upon condition subsequent, liable to be divested by the happening of the contingency rather than to declare it a contingent remainder. For example, a devise was made to E. and J. for their lives successively, and, after the death of the longest liver of them, to A. B., if he lived to attain the age of twenty-one years, but if he died before that age, then over to C. B. It was held that the remainder to A. B. was vested, but was liable to be defeated by the death of A. B. during his minority. Bromfield v. Crowder, 1 Bos. & P. N. R. 313; Doe v. Nowell, 1 M. & S. 327; Blanchard v. Blanchard, 1 Allen, 226; Abbott v. Bradstreet, 3 Allen, 589; Yeaton v. Roberts, 28 N. H. 465; Johnson v. Valentine, 4 Sandf. 36; Maurice v. Maurice, 43 N. Y. 380; Ross v. Drake, 37 Pa. St. 373; Bentley v. Long, 1 Strobb. Eq. 43; Phillips v. Phillips 19 Ga. 261. See *contra*, Sinton v. Boyd, 19 Ohio St. 51; 2 Am. Rep. 369.

But if there is any circumstance connected with the grant or devise which indicates such an intention on the part of the donor, it can and will have that effect. Thus, in a devise to A. for life, and at her death to her children, the remainder would be vested in the children who are *in esse* at the testator's death, and it will open and let in the children born afterwards during the life of A., or during the continuance of her estate.¹

§ 403. **Same — After the happening of the contingency.** — But whatever distinction may exist between a vested and a contingent remainder at their creation, they cease to be distinguishable when the uncertain event which rendered the remainder contingent has happened. After that, the contingent remainder is vested, and has all the characteristics which it would have had, if it had been vested *ab initio*. But the vesting of a contingent remainder must take place at or before the termination of the particular estate; if it occurs afterwards, the remainder fails, and the estate reverts to the grantor or the testator's heirs, as the case may be.²

§ 404. **Cross-remainders.** — Where particular estates are given to two or more in different parcels of land, or in the

¹ Doe v. Prigg, 8 B. & C. 231; Doe v. Perryn, 3 T. R. 484; Viner v. Francis, 2 Cox, 190; Doe v. Considine, 6 Wall. 475; Dingley v. Dingley, 5 Mass. 535; Ballard v. Ballard, 18 Pick. 41; Moore v. Weaver, 16 Gray, 307; Worcester v. Worcester, 101 Mass. 132; Yeaton v. Roberts, 28 N. H. 466; Doe v. Provoost, 4 Johns. 61; Jenkins v. Freyer, 4 Paige Ch. 47; Coursey v. Davis, 46 Pa. St. 25; Carroll v. Hancock, 3 Jones L. 471; Myers v. Myers, 2 McCord Ch. 257; Swinton v. Legare, *Ib.* 440. Those who are *in esse* do not take an absolute vested estate. They cannot bar the rights of those who are unborn by any conveyance they may make. Their estate is vested, but is liable to be defeated *pro tanto* by the subsequent birth of the others. And so strictly are the rights of the unborn guarded, that a sale by the guardian of the children already born under a decree of court was held not to affect the title of the after-born children. Adams v. Ross, 30 N. J. L. 513; Graham v. Houghtalin, 30 N. J. L. 558.

² 1 Prest. Est. 484; 2 Washb. on Real Prop. 556; Doe v. Perryn, 3 T. R. 484; Doe v. Considine, 6 Wall. 475; Wendell v. Crandall, 1 Comst. 491.

same land in undivided shares, and the remainders of all the estates are made to vest in the survivor or survivors, the future estates are called cross-remainders. To explain by example, an estate for life is given in undivided shares to A. and B., remainder to the survivor and his heirs; or to A. and B. in tail, remainder of A.'s estate, upon failure of issue, to B., in fee, and remainder of B.'s estate, upon failure of issue, to A.¹ In some cases, as in the first example, the limitations resemble a joint-tenancy in point of effect, the doctrine of survivorship being practically present. But in the case of cross-remainders, the remainders are not destroyed by a partition, nor is it necessary that they should have present in them the four unities of time, title, estate and possession, so essential in the creation of a joint-tenancy. Although it is usually the case, yet it is not necessary that the particular estates should be undivided shares in the same land; and if they are, that they should be equal shares. These estates, with their remainders, may be interests in altogether different parcels of land. Cross-remainders may be limited by deed or by will, and in a will they need not be by express limitation; they may arise by implication. But in a deed, in conformity with the general rule of construction of deeds, they can only be created by express terms.² They may be vested or contingent, and may be made to vest at any time, provided the contingency is not to happen after the termination of the particular estate.³ They may be limited between two or any greater

¹ 2 Washb. on Real Prop. 556, 557; 4 Cruise Dig. 298; 1 Prest. Est. 94; Co. Lit. 195 b, Butler's note, 1; 4 Kent's Com. 201.

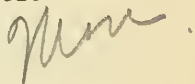
² Co. Lit. 195 b, note 82; Watson v. Foxon, 2 East, 36; Doe v. Worsley, 1 East, 416; Cole v. Livingston, 1 Vent. 224; Cook v. Gerrard, 1 Wms. Saund. 186 n; Hall v. Priest, 6 Gray, 18; Fenley v. Johnson, 21 Md. 117.

³ But this is subject to the qualification to be hereafter stated and explained (see *post*, sect. 417), that a contingent remainder must not be too remote. The same rule applies to cross-remainders. Seaward v. Willock, 5 East, 206; Wood v. Griffin, 46 N. H. 235.

number of persons;¹ and they should be so created that upon the vesting of a remainder it should carry, not only the original estate of the tenant of the particular estate, but also all other remainders which may have vested in him and been transmitted to him from the others, whose particular estates had previously terminated.²

¹ It was once doubted that cross-remainders could be limited to more than two. *Gilbert v. Witty*, Cro. Jac. 656; *Twisden v. Lock*, Ambl. 665; *Wright v. Holford*, Cowp. 31. But it has now been definitely settled that there can be more than two cross-remaindermen. *Doe v. Webb*, 1 Taunt. 233; *Watson v. Foxon*, 2 East, 36; *Doe v. Worsley*, 1 East, 416; *Hall v. Priest*, 6 Gray, 18; *Fenby v. Johnson*, 21 Md. 117.

² 2 Washb. on Real Prop. 557; Co. Lit. 195 b, note 82. In fact, this is the most reliable test by which to determine the existence of cross-remainders, viz.: whether the entire estate, with all its limitations, passes from one to another, at the termination of the particular estate and death of each, until the whole estate vests in the heirs of the survivor. *Doe v. Webb*, 1 Taunt. 233; *Fenby v. Johnson*, 21 Md. 117.



SECTION II.

CONTINGENT REMAINDERS.

SECTION 411. Nature and origin of contingent remainders

- 412. Classes of contingent remainders.
- 413. Vested remainder after a contingent.
- 414. Same — Such limitations in wills.
- 415. Alternate remainders in fee.
- 416. Restrictions upon the nature of the contingency — Its legality.
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- 418. Same — Abridging the particular estate.
- 419. How contingent remainders may be defeated.
- 420. Same — 1. By disseisin of the particular tenant.
- 421. Same — 2. By merger.
- 422. Same — 3. By feoffment.
- 423. Same — 4. By entry of condition broken.
- 424. Trustees to preserve.

§ 411. Nature and origin of contingent remainders. — It has been contended, with much show of reason, that the ancient common law did not admit of the creation of any but vested remainders. And until the reign of Henry VI. no case appears upon record, in which they have been held to be valid limitations.¹ In that reign it was held that in the conveyance to A. for life, remainder to the heirs of J. S., the remainder was a good limitation, which remained contingent until the death of J. S., and was defeated if he did not die during the life time of A. The heirs of J. S. would take the estate in fee at the death of A., as if they had been heirs of A.² It was also involved in doubt, in early

¹ 2 Washb. on Real Prop. 560; Williams on Real Prop. 263. The earlier authorities, on the contrary, are rather opposed to such a conclusion. Williams on Real Prop. 264. Mr. Williams says that the reader should be informed that the assertion is grounded only on the writer's researches. The general opinion appears to be in favor of the antiquity of contingent remainders (p. 263, note d), citing 3d Rep. of Real Prop. Comm'rs, 23.

² 2 Washb. on Real Prop. 560, 561; 2 Bla. Com. 169-171; Williams on Real Prop. 264.

times, what became of the fee while the remainder continued to be contingent. Until the contingency happened, the contingent remainder was deemed a mere possibility — a chance of getting an estate, rather than the estate itself. It was considered an executory interest, the title to which only vested when the contingency happened. Some of the older authorities held that the title to the fee remained, to use their quaint expressions, *in nubibus*, *in gremio legis*, etc. In other words, the title is kept in abeyance while the remainder is contingent.¹ But the modern authorities are inclined to hold that it remains in the grantor, and that he is not divested of the title in remainder until the contingency arrives.² In conformity with the older view of the nature of a contingent remainder, it was formerly held that it was not capable of alienation, nor could it be devised.³ But it is now definitely settled that, although the contingent remainder can only be considered as a possibility, or, at best, only an estate in expectancy,⁴ yet there is a sufficient present right to it upon the happening of the contingency, as to be capable of alienation and devise. The conveyance of a contingent remainder will operate as an estoppel or as an assignment in equity, unless such remainders are made alienable by statute. It is still the rule of law, in the absence of a statute, that there can be no legal conveyance of a contingent remainder.⁵ But it was always possible for a contingent remainder-man to release to one in possession.

¹ Williams on Real Prop. 266; Co. Lit. 342 a; 1 Prest. Est. 251; 2 Prest. Abst. 100-107.

² Williams on Real Prop. 266; Co. Lit. 191a, Butler's note, 78; Fearne Cont. Rem. 361; Shapleigh v. Pilabury, 1 Me. 280; Rice v. Osgood, 9 Mass. 37. But see 4 Kent's Com. 259.

³ 2 Washb. on Real Prop. 562; Williams on Real Prop. 268.

⁴ 2 Washb. on Real Prop. 560; 1 Prest. Est. 75.

⁵ 1 Prest. Est. 76; 2 Cruise Dig. 333; Fearne Cont. Rem. 551; Robertson v. Wilson, 38 N. H. 48; Loring v. Elliot, 16 Gray, 574; Doe v. Oliver, 10 B. & C. 181; Roe v. Dawson, 3 Ld. Cas. Eq. 651; Roe v. Jones, 1 H. Bl. 33; Roe v. Griffiths, 1 W. Bl. 606.

The contingent remainder also descends to the heirs of the remainder-man upon his death before the contingency, provided the contingency does not arise from the uncertainty of the person who is to take the remainder.¹ Where the remainder-man is uncertain, no grant or devise can be made before the happening of the contingency which will have any effect, either in law or equity.²

§ 412. **Classes of contingent remainders.** — Contingent remainders may be divided into two classes, the distinguishing element being the character of the event, upon the happening of which is made to depend the vesting of the remainder. The first class, according to this classification, would include all those remainders which are contingent, because the persons who are to take are not ascertained, or are not in being. Such would be remainders to the heirs of a living person or to an unborn child. In the first case the remainder is contingent, because *nemo est hæres viventis*; the heirs cannot be ascertained until the death of the ancestor, and the remainder will become vested only upon the death of that person. In the second case, the remainder is contingent until the child is born.³ If the remainder is to a class, as to children, it will vest in the first child born, subject to be opened upon the birth of a second to let it in, and so on. If the particular estate terminated after the birth of the first, the remainder would vest completely in that

¹ 1 Prest Est. 76-89; 4 Kent's Com. 262; Williams Real Prop. 277; Roe v. Griffiths, 1 W. Bl. 606; Lampet's case, 10 Rep. 48 a; Marks v. Marks, 1 Strange, 132.

² 2 Washb. on Real Prop. 562. This arose from the practical inability of a conveyance, when it is not ascertained who is the remainder-man. But if a certain individual made a conveyance of the land by a warranty deed, and he subsequently became the vested remainder-man, his deed would certainly operate by way of an estoppel to bar him of any claim to the remainder, as against his grantee.

³ The first class, according to this classification, corresponds to Mr. Fearne's fourth class. Fearne Cont. Rem. 9; Richardson v. Wheatland, 7 Metc. 169; Moore v. Weaver, 16 Gray, 307; Loring v. Eliot, *Ib.* 572.

child, free from the claims of any child thereafter.¹ The second class would include all those remainders which are made to vest upon the happening of a collateral event, and may be subdivided into those cases, where that event is sure to happen, but it is uncertain whether it will happen during the continuance of the particular estate, and those, in which it is doubtful whether the collateral event will happen at all. Thus, in a grant to A. for life, remainder to B. after the death of C., C. is sure to die, but it remains doubtful whether he will die during the lifetime of A., which is necessary for the vesting of the remainder. An example of the second subdivision would be a remainder to B. upon C.'s return from Rome; C.'s return from Rome is uncertain; he may die there, in which event the contingent remainder will never vest and will fail.² To these may be added a third class, in which the event is not collateral, but the happening of which is contingent, and not only causes the remainder to vest, but also constitutes the natural termination of the particular estate. For example, an estate to A. until B. returns from Rome, then over to C. — since B. may never return — the remainder is, therefore, contingent. In such cases the remainder vests only at the time when it is to take effect in possession.³ This division into classes has been criticised by different authorities, and has been declared to involve a useless complication of details;⁴ and it may be that the only natural and necessary division is that given by Blackstone, into two, viz.: where the person who is to

¹ *Doe v. Considine*, 6 Wall. 477; *Carver v. Jackson*, 4 Pet. 90; *Olney v. Hull*, 21 Pick. 311; *Worcester v. Worcester*, 101 Mass. 132; *Jenkins v. Freyer*, 4 Paige Ch. 47; *Coursey v. Davis*, 46 Pa. St. 25; *Adams v. Ross*, 30 N. J. L. 513; *Swinton v. Legare*, 2 McCord Ch. 257. See *ante*, sect. 402.

² Mr Fearn divides these cases into two classes, and they constitute his second and third classes. *Fearne Cont. Rem.* 8; 2 Washb. on Real Prop. 564, 565.

³ 2 Washb. on Real Prop. 563. This is Mr. Fearn's first class. *Fearne Cont. Rem.* 5.

⁴ 4 Kent's Com. 208.

take is dubious, and where the event is uncertain.¹ But the presentation of the minuter subdivisions at least exhibits the various possible forms of contingent remainders and the different contingencies upon which they may be made to depend, and for that reason the above classification is useful, if not necessary.

§ 413. **Vested remainder after a contingent.** — Because the first of two or more remainders is contingent, it does not necessarily follow that the others must be contingent also. The ulterior remainders are contingent only when the contingency is made to apply to the vesting of the whole series of limitations. But they may be so limited that the contingency refers only to the first remainder, and the others are then vested. The vesting of a contingent remainder in such a case only postpones the enjoyment of the others, and its failure only accelerates their time of enjoyment. Thus, where the limitations are to A. for life, remainder to his first and other sons in tail, remainder to B. for life, remainder to his first and other sons in tail, neither A. nor B. had sons at the time. The successive remainders to their sons in tail were contingent, but the remainder to B. not being made to depend upon any contingency — not even the vesting of the remainder to A.'s sons in tail — was vested, notwithstanding the contingency of the preceding remainder.² And if the remainder to A.'s son in tail failed to take effect because A. had no son, the remainder to B. would take effect in possession upon the death of A., the failure of the remainder in tail only having the effect of accelerating the time of enjoyment by B. And if B. had sons before A., the remainder to them in like manner would at once become vested, although the remainder to A.'s sons

¹ 2 Bla. Com. 169.

² *Uvedall v. Uvedall*, 1 Rolle Abr. 119; *Lewis v. Waters*, 6 East, 336; *Wright v. Stephens*, 4 B. & Ald. 574; *Sims v. Conger*, 39 Miss. 232.

is still contingent.¹ There may be a vested remainder after a contingent, even where the contingency refers to a collateral event instead of the birth or uncertainty of the person who is to take, provided the vesting of the subsequent remainder is not made to depend upon the happening of the same contingency. Such was the case in the limitation to A. for life, remainder to B. and C. for eighty years, if D. and E., his wife, so long lived; if E. survived her husband, then to her for life; and after her death to F. in tail, with remainders over in default of issue. The remainder to E. is contingent upon her surviving her husband; but the subsequent remainder to F. in tail, and the remainders over, are vested. If E.'s remainder does not vest, F.'s remainder will take effect in possession at the termination of the remainder to B. and C., the contingency only postponing or accelerating the time for enjoying the subsequent remainders.²

¹ *Wright v. Stephens* 4 B. & Ald. 574; *Bradford v. Foley*, 1 Doug. 63; *Doe v. Brabant*, 3 Bro. C. C. 393; *Sims v. Conger*, 39 Miss. 232.

² *Bradford v. Foley*, 1 Doug. 63; *Napper v. Sanders*, Hutt, 117; *Le-thieullier v. Tracy*, 3 Atk. 774; *Doe v. Ford*, 2 E. & B. 970; *Fearne Cont. Rem.* 233; 2 Washb. on Real Prop. 572. Mr. Fearne divides the cases involving these questions into three classes (*Fearne Cont. Rem.* 233); and although it is not necessary to the understanding of the subject, the classification is here given as a fair example of the almost painful refinements of the earlier common-law writers on the law of real property, and it will assist one in learning the subject of remainders, if the trouble is taken to master the distinctions. Mr. Fearne's first class consists of limitations after a preceding estate, which is made to depend upon a contingency which never takes effect. The second class includes all cases of limitation over upon a conditional determination of the preceding estate, and such preceding estate never takes effect. The third class takes in those remainders, which are limited to take effect upon the determination of a preceding estate by a contingency, which never happens, although the preceding estate does take effect. An example of the first class would be a devise to A. for life, and after his decease remainder to the use of his first and other sons by any future wife in tail male; but if A. should marry any woman related to his present wife, the limitation will be void, and the estate shall go to the children of B. A. did not marry a second time, and the question was, did the children of B. take at the death of A. without issue by a second marriage. It was held that the contingency

§ 414. **Same — Such limitations in wills.** — There is very little difficulty experienced in determining whether the contingency affects all of the successive limitations in remainder, when they appear in a deed. But, on account of the frequently inaccurate and untechnical language of testators, such limitations in wills often give considerable trouble in the interpretation and construction of them. And it may be laid down as the universal rule that the determination of these questions depends upon what appears to be the intention of the testator in respect to them, as expressed in his will. If the intention appears to have been to extend the contingency to all the limitations, it will have the effect of making them all contingent; otherwise the subsequent remainder will be vested, whatever may be the strict and literal meaning of the terms used.¹ Thus a devise

only affected the limitation to A.'s issue, and that the remainder to the children of B. was vested, and therefore took effect, notwithstanding the limitation to A.'s issue by a second marriage failed. *Bradford v. Foley*, 1 Doug. 63. See *Scatterwood v. Edge*, 1 Salk. 230 n; *Doe v. Brabant*, 3 Bro. C. C. 393. The second class may be demonstrated by the following case: A devise to A. for years, remainder to the first and other sons of B. in tail male, successively, provided they should take the name of the testator; if they refuse to do so, or they die without issue, then to the first-born son of C. in tail male, with remainders over. B. never had any sons. If the condition, the performance of which had to precede the vesting of the estate in B.'s son, affected the remainder to C.'s son, then the failure of issue in B. would defeat the remainder to C.'s son. But it was held that that was not the case; that the remainder to C.'s son was independent of this contingency, and took effect, whatever became of the remainder to B.'s sons. *Scatterwood v. Edge*, 1 Salk. 230. The following is an example of the third class: A. devised to his son in tail male, remainder to B. for life, remainder to B.'s sons in tail male, upon condition that he should change his name, and upon his refusal, or the refusal of any of his sons to do so, the estate was to go to D. B. performed the condition, and died without issue. It was held that the performance of the condition by B. defeated the devise over to D., for the latter limitation was intended only to take effect upon the breach of the condition. *Amherst v. Lytton*, 3 Bro. P. C. 486. But see *Luxford v. Cheeke*, 3 Lev. 125. See 2 Washb. on Real Prop. 572–575.

¹ 2 Washb. on Real Prop. 573, 575; 1 Prest. Est. 88; *Fearne Cont. Rem.* 235; *Luxford v. Cheeker*, 3 Lev. 125; *Doe v. Shipphard*, 1 Doug. 75; *Davis v. Norton*, 2 P. Wms. 390.

was limited to the use of testator's son for life, and, on his decease, remainder to the use of his first and other sons by any future wife in tail male; provided that if the son should marry any woman related to his present wife the uses to the issue of such marriage would be void and the estate go to the use of the children of H. The son did not marry at all. There was no express direction as to how the estate should go if the son died without issue. But it was held upon the construction of the whole will that the intention of the testator was that the children of H. should take, whether the son married the objectionable person, or did not marry at all.¹ The two following cases will show how close and refined the construction can be, and how dependent the construction is upon the apparent intention of the testator. In the one case the devise was to A. for a term of years, remainder to the first and other sons of B. in tail male, provided they each should take the name of the testator; but should they refuse to do so, or should die without issue, then over to C.'s eldest son in tail male, with remainders over. A strict construction of this devise would make the remainder to C.'s eldest son in tail, as well as the other remainders over, contingent upon the refusal of B.'s sons to take the testator's name, and these remainders could only vest upon the happening of this contingency. But the court held that the contingency only referred to the remainders to B.'s sons, and if B. had no son the remainder to C.'s son would take effect just as well as if B. had had a son, and the son had refused to perform the condition annexed to his estate.² In the other case, the devise was to the testator's son in tail male, remainder to B. for life, remainder to B.'s sons in tail male, upon condition that he should change his name, and if he, or any son of his, should refuse so to do, the estate was to go to D. The testator's son died with-

¹ *Bradford v. Foley*, 1 Doug. 63.

² *Scatterwood v. Edge*, 1 Salk. 230.

out issue. B. changed his name and then died without issue. It was held that D.'s estate was to vest only in case B. or any of his sons should refuse to perform the condition, and since B. did change his name, the condition was performed, and his death afterwards without issue defeated the estate in D.¹ This subject has received a more full and complete treatment by Mr. Fearne in his work on contingent remainders, but the explanation here given will suffice for all practical purposes.

§ 415. **Alternate remainders in fee.** — Although it is a well established rule that a remainder cannot be limited after a fee, yet estates may be so limited that the remainder in fee shall go to one or the other of two persons upon the happening or not happening of a certain contingency. This is called a *fee with a double aspect*. If the remainder vests in one the other remainder is absolutely void, and the second vests only when the first fails. Thus a devise was made to A. for life, and if he had issue, then to such issue in fee; but if he died without issue, then to B. in fee. If A. died without issue, then the remainder to B. would vest and take effect; but if A. died leaving issue, B.'s remainder would at once be defeated. B.'s remainder is not made to take effect upon the determination of the remainder to A.'s issue. If it had been so limited as to take effect in derogation of the remainder to A.'s issue, after it had vested, it would have been void as a remainder, although it would have been held good as an executory devise. But the alternate re-

¹ *Amherst v. Lytton*, 3 Bro. P. C. 486. A parallel case to the one cited in the preceding note, in which the court reached a contrary decision, is that of *Luxford v. Cheeke*, 3 Lev. 125. In that case the testator devised to his wife for life; but if she married again, the estate should, upon her marriage, vest in his son H. in tail male, with remainders over. The wife did not marry again, and died. It was held, that from a consideration of the whole will, it was the apparent intention of the testator that his son H. should take the estate in tail, only in case the testator's wife should marry again, and since she remained a widow, the remainder in tail was defeated.

mainders, in order to be good, must both be contingent. The second is necessarily contingent, and if the first is vested the second could only take effect by defeating or destroying the first, and this would make it a remainder limited after a fee, and therefore void.¹

§ 416. **Restrictions upon the nature of the contingency — Its legality.** — The contingent event, upon the happening of which the remainder is to vest, must not be illegal, or *contra bonos mores*, against good morals. Thus, if the remainder is limited to a bastard not in being, it would be void. And such would be the case whenever the contingency involved was against public policy. This is only a reiteration of the rule, by which the legality of all conditions to estates is tested.²

§ 417. **Same — Remoteness.** — The event must not be too remote, so as to suspend the power of alienation beyond the period allowed by the policy of the law. Lord Coke, and the law writers of his day, laid down the rule that the event must be a *common possibility*, as it was called; and that if a *double possibility*, or a *possibility upon a possibility*, was involved in the contingency, the remainder would be void. A remainder to an unborn son, according to this rule, would be good; but a remainder to A., the unborn son

¹ Luddington v. Kime, 9 Ld. Raym. 203; Goodwright v. Dunham, 1 Doug. 265; Doe v. Shelby, 2 B. & C. 923; Doe v. Challis, 2 Eng. Law & Eq. 215; Dunwoodie v. Reed, 3 Serg. & R. 452; Taylor v. Taylor, 63 Pa. St. 481; 3 Am. Rep. 565; 2 Washb. on Real Prop. 575-577. In Luddington v. Kime, which may be taken as a good example of the rule, the devise was to A. for life, remainder to his male issue in fee simple, remainder over to T. B., if A. should die without male issue. These remainders are alternate, one of which alone can vest, and the vesting of one and the defeat of the other are to take place at the same time, viz.: at the death of A. If the remainder to T. B. had been limited on another contingency, and its vesting was to take place at some other time, or if the limitation to A.'s issue was vested, instead of being contingent, the remainder to T. B. would be a remainder limited after a fee.

² 2 Washb. on Real Prop. 580; Williams on Real Prop. 272.

of B., would be void, because it involved a double possibility: *First*, that B. shall have a son; and *secondly*, that his name shall be A. This rule has long since been discarded by the courts as misleading, and not at all consonant with public policy. Such a remainder would now be held good.¹ It has never received general recognition by the courts, and it was even evaded by the authors of it by the introduction of vital exceptions. For example, Lord Coke tells us that the contingency of two persons, presently married to different persons, marrying each other, is only a common possibility; while the possibility that one shall have a son named A. is double.² But while this rule no longer prevails, it does not follow that a remainder will be good, however remote the contingency may be. Some have held that the rule of perpetuities, which prevails in respect to executory devises and contingent uses, has been applied to contingent remainders. But this is equally fallacious.³ The only restriction imposed upon the limitation of contingent remainders is that there can be no limitation to the un-

¹ 2 Washb. on Real Prop. 580; Williams on Real Prop. 273, 274; Cholm-
dey's Case, 2 Rep. 51; Cole v. Sewell, 4 Dru. & Warr. 27, s. c. 2 H. L.
Cas. 186. In Routledge v. Dorvil, 2 Ves. jr. 357, a remainder was upheld,
the vesting of which depended upon four contingencies; that a husband
and wife should have a child, that the child should have a child, that the
grandchild should be alive at the decease of the survivor of the grandparents,
and if it is a grandson, he should attain the age of twenty-one, and if a grand-
daughter, she should attain that age or marry. In Cole v. Sewell, *supra*,
Lord St. Leonards (Sir E. Sugden) says: "As to the question of remoteness,
at this time of day I was very much surprised to hear it pressed upon the
court, because it is now perfectly settled that where a limitation is to take
effect as a remainder, remoteness is out of the question; for the given limita-
tion is either a vested remainder, and then it matters not whether it ever
vest in possession, because the previous estate may subsist for centuries, or
for all time, or it is a contingent remainder, and then, by the rule of law,
unless the event upon which the contingency depends happens so that the
remainder may vest *eo instanti*, the preceding limitation determines, it can
never take effect at all."

² Williams on Real Prop. 273; 2 Rep. 51 b; 10 Rep. 50 b.

³ Williams on Real Prop. 274, Rawle's note.

born child of an unborn person.¹ In abolishing the rule that there cannot be a double possibility, the courts extracted therefrom its essence, and formulated it in the above rule. A remainder, therefore, may be made to depend upon any number of contingencies, provided the person who is to take is not the unborn child of an unborn person. This does not, of course, prevent the limitation of an estate tail to an unborn child. And when a testator attempts to give a life estate to an unborn person, with remainder in tail to his children, the courts, taking note of the general intent to create an estate tail, will construe the estate to the unborn person to be a fee tail, instead of declaring void the remainder in tail to his children.² But if such a limitation appeared in a deed this construction could not be upheld, and the remainder would be declared void.³

§ 418. **Same — Abridging the particular estate.** — A third rule in respect to the contingent event is that it must not abridge the particular estate, so as to defeat it before its natural termination. In other words, a remainder cannot be limited after an estate upon condition, to take effect upon the breach of the condition, even if the estate upon condition is less than a fee. Thus, in a limitation to a widow for life, and if she should marry again, then over, the limitation over would be void if it appears in a deed — unless it was in the nature of a shifting use; — and, if by will, it could only take effect as an executory devise. The limitation, in order to be good as a remainder, should be to the

¹ *Hay v. Coventry*, 3 T. R. 86; *Brudenell v. Elwes*, 4 East, 452; *Fearne Cont. Rem.* 562, 565; *Monypenny v. Dering*, 2 De G. M. & G., 145; *s. c.* 16 M. & W. 428; *Cole v. Sewell*, 2 H. L. Cas. 186; *Counden v. Clerke*, Hob. 33 a; *Jackson v. Brown*, 13 Wend. 442.

² *Doe v. Cooper*, 1 East, 234; *Den v. Pukey*, 5 T. R. 303; *Monypenny v. Dering*, 16 M. & W. 423; *Humberston v. Humberston*, 1 P. Wms. 332; *Nourse v. Merriam*, 8 Cush. 11; *Allyn v. Mather*, 9 Conn. 114; *Jackson v. Brown*, 13 Wend. 437; *Daebler's Appeal*, 64 Pa. St. 15.

³ 2 Washb. on Real Prop. 582; *Williams on Real Prop.* 276, *Rawle's note*.

widow as long as she remains a widow, remainder over. That is, the preceding estate must be an estate upon limitation, instead of an estate upon condition.¹ The only exception to this rule is where the remainder is given to the same person who has the particular estate, or to the survivor or survivors of them. In such a case, the happening of the condition and the consequent vesting of the remainder only defeats the particular estate by causing it to merge in the greater estate, and practically enlarges it instead of defeating it. Thus an estate was given to a wife and daughter for their lives and the life of the survivor, and if the daughter had issue, then to the daughter and her heirs forever after the death of the wife; and if the daughter died without issue, then to the wife and her heirs forever. These remainders were held good in accordance with the above exception.² The limitations after the estate for life to the wife and daughter were alternate remainders, and not conditional limitations.

§ 419. **How contingent remainders may be defeated.** — As a corollary to the rule that the contingent remainder must vest on or before the termination of the particular estate, by whatever means it is determined, it follows that if the particular estate is defeated or destroyed in any manner before its natural period of limitation has run, the contingent remainder will also be defeated, if it has not then

¹ 2 Washb. on Real Prop. 582, 583; 1 Prest. Est. 91; Fearne Cont. Rem. 262; *Sheffield v. Orrery*, 3 Atk. 282; *Cogan v. Cogan*, Cro. Eliz. 360; *Proprietors Brattle Sq. Church v. Grant*, 3 Gray, 149; *Green v. Hewitt*, 97 Ill. 113; 13 Am. Rep. 102. In Indiana, Wisconsin, and Minnesota, statutes permit the limitation of contingent remainders, which, in vesting, abridge the particular estates which support them. And in New York, all conditional limitations are made legal estates, and a limitation to take effect in derogation of the particular estate is a legal estate, although it is not a contingent remainder. 2 Washb. on Real Prop. 594.

² 2 Washb. on Real Prop. 583, 584; *Goodtitle v. Billington*, 1 Doug. 753. But see *Johnson v. Johnson*, 7 Allen, 197.

become vested. At common law the rule was applied almost without limitation, so that any destruction of the particular estate resulted in a defeat of the remainder.¹

§ 420. **Same — 1. By disseisin of the particular tenant.** — The mere disseisin of the tenant for life would not defeat the contingent remainder, provided he has not been so far divested of his seisin that he has lost his right of entry, and would be forced to his right of action in order to recover the seisin. In such a case there would be no seisin, whether legal or actual, present in the particular tenant to support the remainder, and it would accordingly be defeated. But as long as he has not lost his right of entry he still retains the legal seisin, although deprived of his actual seisin by the tortious possession of the disseisor.² The common-law distinction between the right of entry and of action, and the law of descent cast, resulting in a loss of the right of entry, have been abolished in most of the States, so that the prevailing rule in this country is that no disseisin of the particular tenant will work a destruction of the contingent remainder.³

§ 421. **Same — 2. By merger.** — It has already been shown that whenever a particular estate and a remainder become united in one person at the same time, the former is merged in the latter, the whole becoming one estate. The particular estate is effectually destroyed by a merger, and loses its identity altogether. If, therefore, the particular tenant surrenders to the reversioner or ultimate re-

¹ *Doe v. Gatace*, 5 Bing. N. C. 609; *Archer's Case*, 1 Co. 66 b; *Penhey v. Harrell*, 2 Freem. 213; 2 Bla. Com. 171; 2 Washb. on Real Prop. 589.

² 2 Washb. on Real Prop. 586; 2 Cruise's Dig. 245; *Williams on Real Prop.* 280; *Fearne Cont. Rem.* 286.

³ 2 Washb. on Real Prop. 586, *note. In Massachusetts, Kentucky, Mississippi, Missouri, Texas, Virginia, New York, Michigan, Minnesota, and Wisconsin, disseisin of the tenant of the particular estate will not defeat the contingent remainder. 2 Washb. on Real Prop. 594.

mainder-man in fee, or if he acquires the reversion without a vested intervening estate, the intervening contingent remainder will be defeated.¹ This will happen, whether the reversion is acquired by descent or by purchase, except in one single case of descent. If the particular and contingent remainders are created by a devise, and the reversion descends to the tenant of the particular estate, as the heir of the testator, no merger would result, as it would nullify the expressed intention of the testator to give a contingent remainder to a person other than his heir. But if the particular tenant, in the case of such a devise, subsequently acquires the reversion by purchase, or by descent from the heir of the testator, a merger will result as in any other case, and the contingent remainder will be defeated.²

§ 422. **Same — 3. By feoffment.** — The contingent remainder could also be defeated by the conveyance of the tenant by feoffment. It was the peculiar rule in connection with this mode of conveyance, that if the tenant of a particular estate — for example, the tenant for life — attempted to convey a fee or other greater estate by feoffment, he lost his estate and conveyed nothing to his feoffee.³ The particular estate was effectually destroyed, and it would consequently defeat any contingent remainders depending upon it. But this peculiarity prevailed only in the case of feoffment. If the conveyance was in any other form, as by any

¹ *Penhey v. Harrell*, 2 Freem. 213; *Doe v. Gatace*, 2 Bing. N. C. 609; *Archer's Case*, 1 Co. 66 b; 2 Washb. on Real Prop. 589. But there will be no merger by the transfer to the tenant in tail of the remainder after the estate tail. *Wiscott's Case*, 2 Rep. 61 *Roe v. Baldwere*, 5 T. R. 110; *Poole v. Morris*, 29 Ga. 374.

² *Fearne Cont. Rem.* 340; 2 Washb. on Real Prop. 589, 590; *Crump v. Norwood*, 7 Taunt. 362; *Doe v. Scudmore*, 2 B. & P. 294; *Plunket v. Holmes*, 1 Lev. 11; *Cresfield v. Storr*, 86 Md. 129.

³ See *post*, sect. 770. "If it (the feoffment) proposed to convey a fee simple, it created an actual fee simple in the feoffee, by right or by wrong, according as the feoffor was or was not seized in fee." 3 Washb. on Real Prop. 351.

of the deeds operating under the Statute of Uses, the grantee would take only what estate the tenant had, and the contingent remainder would remain unaffected.¹

§ 423. **Same — 4. By entry for condition broken.** — If the particular estate is an estate upon condition, since a contingent remainder could not be made to vest upon the breach of the condition, such a breach and the consequent entry of the reversioner, he being the only one who could enter, would destroy the particular estate, and therewith the remainder dependent upon it.²

§ 424. **Trustees to preserve.** — To remove the great danger of destruction by the act of the particular tenant, to which contingent remainders were exposed, a very ingenious method was devised by Sir Geoffrey Palmer and Sir Orlando Bridgman, whereby the contingent remainder was fully protected from the effect of a destruction of a particular estate before its natural termination. It was by interposing between the particular estate and the contingent remainder — a vested remainder to trustees, as it was called, “to preserve contingent remainders.” For example, the limitations would be to A. for life, remainder during the life of A. to trustees to preserve contingent remainders, remainder to the heirs of B. If, by any act of his, A.’s estate is de-

¹ 2 Washb. on Real Prop. 589; *Thompson v. Leach*, 2 Salk. 576; *Smith v. Clyfford*, 1 T. R. 744; *Dennett v. Dennett*, 40 N. H. 498; 3 Washb. on Real Prop. 352. It is now provided by statute that feoffment shall not have any tortious operation. 3 Washb. on Real Prop. 351; 4 Kent’s Com. 481. There are also general statutory provisions in Massachusetts, Kentucky, Mississippi, Missouri, Texas, Virginia, New York, Michigan, Minnesota, and Wisconsin, which declare that no alienation or other act of the tenant of the particular estate shall defeat the contingent remainder before the happening of the contingency, on which the vesting of the remainder is made to depend. 2 Washb. on Real Prop. 594, 595.

² *Cogan v. Cogan*, Cro. Eliz. 360; *Sheffield v. Orrery*, 3 Atk. 282; *Proprietors Brattle Sq. Church v. Grant*, 3 Gray, 149; *Williams v. Angell*, 7 R. I. 152.

stroyed, whether it be by disseisin, merger, feoffment, or the breach of a condition attached to his estate, the vested remainder to the trustees will take effect in possession. And since their estate is a trust, they cannot in any way defeat it; it continues to exist under all circumstances, until the period of its natural limitation has expired.¹ In England, and generally in the States of this country, statutes have been passed preventing the destruction of the contingent remainder by the determination of the particular estate in any other mode, except the expiration of the period of natural limitation. Wherever there are such statutes it is not necessary to interpose a remainder to trustees; but in times past it was a very essential precaution, and was generally employed.

¹ 2 Washb. on Real Prop. 590; 2 Bla. Com. 171; Fearne Cont. Rem. 325; Williams on Real Prop. 283, 284.

SECTION III.

ESTATES WITHIN THE RULE IN SHELLEY'S CASE.

SECTION 433. — Origin and nature of the rule.

434. — Requisites of the rule.

§ 433. **Origin and nature of the rule.** — It has long been a rule of the common law, that if an estate for life, or any other particular estate of freehold, be given to one with remainder to his heirs, the first taker shall be held to have the fee, and the heirs will take by descent and not by purchase. The first taker is thereby enabled to make a free disposition of the estate in fee, and the heirs take by descent, only when no disposition has been made of it by the first taker. The rule was first given an authoritative utterance in Shelley's Case, decided in the time of Lord Coke, and hence it is called "the rule in Shelley's Case." Although called "the rule in Shelley's Case," it was then an ancient rule of the common law.¹ Blackstone refers it to a case which was tried in the 18 Edw. II. It is not definitely known what are the precise reasons for establishing such an arbitrary rule. Some have held that it was to prevent the loss of the lord's wardships by permitting the heirs to take as purchasers; while others have thought it arose from the general prevalence of the custom to construe the word "heirs," in instruments of

¹ Shelley's Case, 1 Rep. 94; 2 Washb. on Real Prop. 597; Williams on Real Prop. 253. In *Perrin v. Blake*, 4 Burr. 2579, Mr. Justice Blackstone refers to a case decided in the reign of Edw. II. (18 Edw. II. fol. 577), in which he thinks the rule was first laid down. Mr. Rawle in his note, (Williams on Real Prop. 255, note 1), calls the reader's attention to the fact that the validity of the rule was not brought into question in Shelley's Case, but it was there for the first time stated so clearly that it has been given the name of the *rule in Shelley's Case*.

conveyance, as a word of limitation instead of purchase.¹ Perhaps the best reason is to be found in the fact, that at the time, when the rule was first established, a contingent remainder was an impossible limitation, the remainder to the heirs being contingent until the death of the ancestor, and the rule was devised, in order to give effect to the intent of the grantor, as nearly as possible.² But whatever may have been the reason, it is a well established rule, and prevails wherever it is not abolished by statute.³ But in

¹ 2 Washb. on Real Prop. 597; Williams on Real Prop. 254; 1 Prest. Est 306.

² This is the suggestion of the author, based upon the opinion of Mr. Williams, in which the author concurs, that at an early day contingent remainders were not recognized as valid legal limitations. See *ante*, sect. 411; Williams on Real Prop. 263. A remainder to the heirs of the tenant for life would be a contingent remainder, unless it was made under the rule in Shelley's Case, to enlarge the estate of the first taker into a fee.

³ The rule has been generally recognized by the courts of this country, and it still prevails in perhaps most of the States. *Geog v. Morgan*, 16 Pa. St. 95; *Carter v. McMichael*, 11 Serg. & R. 429; *Kleppner v. Laverty*, 70 Pa. St. 73; *James' Claim*, 1 Dall. 47; *Moore v. Dimond*, 5 R. I. 273; *Tillinghast v. Coggeshall*, 7 R. I. 383; *Lyles v. Digge*, 6 Harr. & J. 364; *Chilton v. Henderson*, 9 Gill, 432; *Roy v. Garnett*, 2 Wash. (Va.) 9; *Smith v. Chapman*, 1 Hen. & M. 240; *Dott v. Cunningham*, 1 Bay, 453; *Carr v. Porter*, 1 McCord Ch. 60; *Polk v. Faris*, 9 Ga. 209; *Davidson v. Davidson*, 1 Hawks, 163; *Hull v. Beals*, 23 Ind. 28; *Siceloff v. Redman*, 26 Ind. 251; *Hancock v. Butler*, 21 Texas, 804; *Hawkins v. Lee*, 22 Texas, 547; *Baker v. Scott*, 62 Ill. 86; *Brislain v. Wilson*, 63 Ill. 175; *Butler v. Heustis*, 68 Ill. 594; 18 Am. Rep. 589. In *Hillman v. Bouslagh*, 13 Pa. St. 344, Chief Justice Gibson, in an able opinion, gives the rule a most earnest support, and defends the policy of retaining it as a part of the American law of real property. "The rule in Shelley's Case," says he, "ill deserves the epithets bestowed on it in the argument. Though of feudal origin, it is not a relic of barbarism, or a part of the rubbish of the dark ages. It is part of a system; an artificial one, it is true, but still a system, and a complete one. * * * It happily falls in with the current of our policy. By turning a limitation for life, with remainders to the heirs of the body, into an estate tail, it is the handmaid, not only of *Taltarum's Case* (in this case, estates tail were held for the first time to be barred by a common recovery. See *ante*, sect. 49), but of our statute for barring entails by a deed acknowledged in court, and where the limitation is to heirs general, it cuts off what would otherwise be a contingent remainder, destructible only by a common recovery. * * * It is admitted that the rule subverts a particular intention in perhaps every instance; for, as was said in *Roe v. Bedford*, 4

some of the States at the present time, the rule has been abolished by statute, and the limitation to the heirs would be construed to be a contingent remainder, the heirs taking by purchase.¹

Maule & Sel. 363, it is proof against even an express declaration that the heirs shall take as purchasers. But it is an intention which the law cannot indulge, consistently with the testator's general plan, and which is necessarily subordinate to it. It is an intention to create an inalienable estate tail in the first donee, and to invert the rule of interpretation, by making the general intention subservient to the particular one. The donor is no more competent to make a tenancy for life a source of inheritable succession, than he is competent to create a perpetuity, or a new canon of descent. The rule is too intimately connected with the doctrine of estates to be separated from it without breaking the ligaments of property." The learned judge is wrong, when he says that the general rule of the law of interpretation and construction does not require the general intention to be subservient to the particular one. In the construction of wills, in which this conflict between a general and a particular intent usually arises, the general intention only controls the particular when the latter is inoperative on account of its illegality or impossibility of performance, and the general intent is carried out under the *cy pres* doctrine to prevent a complete failure of the gift. If it be true that the rule in Shelley's Case arose from an inability, according to the early law, to create a contingent remainder, and this is certainly more plausible than to suppose that the courts would arbitrarily nullify the expressed intention of the donor, for that would be an assumption by the courts of legislative powers, then since contingent remainders are now valid limitations, the particular intent of the donor should be allowed to take effect. If it is against the policy of the law to permit the creation of contingent remainders, then they should be abolished by statute. The courts have no legitimate power to effect the change by any such arbitrary and absurd rule of construction, as the rule in Shelley's Case.

¹ The rule has been abolished by statute in Maine, Massachusetts, Connecticut, New York, Missouri, Michigan, Tennessee, Virginia, Kentucky, Alabama, and Wisconsin. 2 Washb. on Real Prop. 607, note 2; Williams on Real Prop. 260, Rawle's note. In these States the rule has been abolished altogether, both as to grants and to wills. *Richardson v. Wheatland*, 7 Metc. 172; *Bowers v. Porter*, 4 Pick. 205; *Goodrich v. Lambert*, 10 Conn. 448; *Moore v. Littell*, 40 Barb. 488; *Williamson v. Williamson*, 18 B. Mon. 329. But in New Hampshire, New Jersey, and Ohio, the rule is only abolished as to wills. 2 Washb. on Real Prop. 607, note 2; *Dennett v. Dennett*, 40 N. H. 500; *Den v. Demarest*, 1 N. J. 525. In Mississippi it is abolished as to real estate. *Powell v. Brandon*, 24 Miss. 343. And in Rhode Island it is declared by statute not to apply to devises, in which the property is limited to one for life and remainder to the *children or issue* of the devisee for life. *Williams v. Angell*, 7 R. I. 145. But the rule still holds good in all grants and devises in which the limitation

§ 434. **Requisites of the rule.** — In order that the rule in Shelley's Case may apply, there must be a freehold in the first taker, limited expressly or by implication. An estate less than a freehold would not be sufficient, because a seisin in the first taker is necessary to draw the remainder to the particular estate.¹ It must, in the second place, be

in remainder is to the heirs generally, or to the heirs of the body, of the first taker. *Bullock v. Waterman St. Soc.*, 5 R. I. 273; *Moore v. Dimond*, *Ib.* 127; *Manchester v. Durfee*, *Ib.* 549; *Cooper v. Cooper*, 6 R. I. 264; *Tillinghast v. Coggeshall*, 7 R. I. 383; *Jillson v. Wilcox*, *Ib.* 518. In *Moore v. Littell*, 41 N. Y. 66, which was affirmed in *House v. Jackson*, 50 N. Y. 165, it was declared by the New York Court of Appeals, that, after the abolition by statute of the rule in Shelley's Case, the limitation to the heirs of the donee for life is a vested remainder. This remarkable decision is altogether inconsistent with the rules of the law of remainders, and even with the New York statutory definition of a contingent remainder, viz.: that they are contingent "whilst the person to whom or the event upon which they are limited to take effect remains uncertain." 1 Rev. Stat. p. 723, sect. 13; *McCall on Real Prop.* 113. Prof. McCall in referring to the case of *Moore v. Littell*, says: "Thus a grant to A. for life, and after his decease to his heirs and assigns forever, gives to the children of A. a vested interest in the land; although liable to open and let in after born children of A., and also liable, in respect of the interest of any child, to be wholly defeated by his death before his father." *Query*, if there are no children, in whom is the remainder vested? the collateral heirs? The true doctrine is, that such a remainder is contingent, *nemo est hæres viventis*, and this is the rule of the other courts. *Richardson v. Wheatland*, 7 Metc. 169; *Moore v. Weaver*, 16 Gray, 307; *Williams v. Angell*, 7 R. I. 145; *Hillman v. Bouslaugh*, 13 Pa. St. 344.

¹ *Pibus v. Mitford*, 1 Ventr. 372; *Webster v. Cooper*, 14 How. 500; *Ogden's App.*, 70 Pa. St. 509; *Williams on Real Prop.* 256; 2 Washb. on Real Prop. 598, 601. The rule in Shelley's Case applies to equitable estates as well as to legal estates, where the trusts are *executed*. *Croxhall v. Shererd*, 5 Wall. 281; *Tillinghast v. Coggeshall*, 7 R. I. 383. If they are *executory*, as they usually are in marriage settlements, or if it is the clear intention of the donor that the tenant for life shall not have the power to cut off the estate in remainder, the rule will not apply. 2 Washb. on Real Prop. 495; *Sand. Uses*, 311; *Jones v. Laughton*, 1 Eq. Cas. Abr. 392; *Gill v. Logan*, 11 B. Mon. 231; *Berry v. Williamson*, 11 B. Mon. 245. The rule is applied to executed trusts with this qualification, that the two estates, the freehold in possession and the remainder, must both be legal or both equitable. The rule will not apply where one is legal and the other is equitable. *Silvester v. Wilson*, 2 T. R. 444; *Adams v. Adams*, 6 Q. B. 860; *Doe v. Ironmonger*, 3 East, 533; *Curtis v. Rice*, 12 Ves. 89; *Croxhall v. Shererd*, 5 Wall. 281; *Ward v. Amory*, 1 Curt.

created by the same instrument as is the remainder to the heirs. If given by different instruments the rule will not apply.¹ But a will and an annexed codicil are in this connection considered as constituting one instrument, and the rule would apply if the life estate was given in the will proper, and the reversion in the codicil. So also would the rule apply if, instead of a grant of a remainder, there appeared in the same instrument a power of appointment to the heirs.² In the next place, the subsequent limitation must be made to the heirs of the first taker. If the remainder is limited to the heirs of a stranger, or if it is limited to the joint heirs of two persons, one of whom alone takes the estate in possession, the rule does not apply, and the subsequent limitation remains a contingent remainder in the heirs as purchasers.³ If the limitation be to the heirs of his body, the first taker would have an estate tail instead of a fee.⁴ But if the limitation be to one's heir and the heirs male of the heir, the rule is not applicable, the express

419; *Tillinghast v. Coggeshall*, 7 R. I. 383; *Tallman v. Wood*, 26 Wend. 9. But if both are legal it will not prevent the rule from applying if one of them is charged with a trust and the other is an absolute estate. *Tud. Ld. Cas.* 484; *Douglass v. Congreve*, 1 Beav. 59; *s. c.*, 4 Bing. N. C. 1.

¹ 2 Washb. on Real Prop. 598; *Co. Lit.* 299 b; *Butler's note*, 261; *Doe v. Fonnereau*, 1 Dougl. 508; *Moore v. Parker*, 1 Ld. Raym. 37; *Webster v. Cooper*, 14 How. 500; *Adams v. Guerard*, 29 Ga. 675.

² *Williams on Real Prop.* 256; 2 Washb. on Real Prop. 598; *Hayes v. Forde*, 2 W. Bl. 698; *Tud. Ld. Cas.* 483, 484; *Co. Lit.* 299 b, *Butler's note*, 261; *Tillinghast v. Coggeshall*, 7 R. I. 383. But where a power of appointment is interposed between an estate for life and a contingent remainder to one's children or to *special* heirs, the rule does not apply, and the children or special heirs take as purchasers, although the interposition of the power would not prevent the application of the rule, where the remainder was limited to the heirs generally. *Dodson v. Ball*, 60 Pa. St. 497; *Yarnall's App.*, 70 Pa. St. 342.

³ *Archer's Case*, 1 Co. 66 b; *Fuller v. Chamier*, L. R. 2 Eq. 682; *Webster v. Cooper*, 14 How. 500; 2 Washb. on Real Prop. 599; *Williams on Real Prop.* 261.

⁴ *Pibus v. Mitford*, 1 Ventr. 372; *Hillman v. Bouslagh*, 13 Pa. St. 351; *Toller v. Atwood*, 15 Q. B. 929; *Doe v. Harvey*, 4 B. & C. 610.

limitation in tail preventing an amalgamation of the two estates.¹ But, with these exceptions, nothing that the grantor can do will prevent the application of the rule if the remainder in fee or in tail is given to the heirs of the first taker — not even an express direction that the rule should not apply.² But limitations to the sons, children, or issue of him who takes the life estate, will not be converted by the rule into a fee in the first taker, unless they are created by will, and, from a consideration of the whole will, it appears that these words were used in the sense of heirs. And the strongest and clearest evidence is necessary to give this construction to the words *sons* or *children*. It is easier to apply this construction to the word *issue*. The general rule is that persons thus described take as purchasers and not by descent, and that the remainders are vested as soon as persons corresponding to the description come into being.³ The rule will also apply, even though there are intervening limitations to strangers. But the fee in remainder would vest in the first taker expectant upon the termination of the intermediate limitation. The intermediate limitation is not destroyed by merger of the estate in possession and the remainder under the operation of the rule in Shelley's Case.⁴

¹ Tud. Ld. Cas. 493; McCullough v. Gliddon, 38 Ala. 208.

² Perrin v. Blake, 1 W. Bl. 672; s. c., 4 Burr. 2579; Roe v. Bedford, 4 Maule & Sel. 363; Toller v. Atwood, 15 Q. B. 929; Doe v. Harvey, 4 B. & C. 610; Jesson v. Doe, 2 Bligh, 1; Doeblers App., 64 Pa. St. 15; Klappner v. Laverty, 70 Pa. St. 73; Tud. Ld. Cas. 488, 489; 2 Washb. on Real Prop. 602.

³ Poole v. Poole, 3 Bos. & P. 620; Slater v. Dangerfield, 15 M. & W. 263; Doe v. Daviess, 4 B. & Ad. 43; Shaw v. Weigh, Strange, 798; Robinson v. Robinson, 1 Burr. 38; Lees v. Mosley, 1 Younge & C. 589; Doe v. Charlton, 1 M. & G. 429; Doe v. Collis, 4 T. R. 299; Flint v. Steadman, 36 Vt. 210; Macumber v. Bradley, 28 Conn. 445; Adams v. Ross, 30 N. J. L. 512, overruling Ross v. Adams, 28 N. J. L. 172; Price v. Sisson, 13 N. J. 177; Price v. Taylor, 28 Pa. St. 102; Tyler v. Moore, 42 Pa. St. 389; Taylor v. Taylor, 63 Pa. St. 483; 3 Am. Rep. 565; Webster v. Cooper 14 How. 500; Ford v. Flint, 40 Vt. 394; Sinton v. Boyd, 19 Ohio St. 57; 2 Am. Rep. 369.

⁴ 2 Washb. on Real Prop. 601; Williams on Real Prop. 256-260.

CHAPTER XIII.

USES AND TRUSTS.

- SECTION I. *Uses before the Statute of Uses.*
II. *Uses under the Statute of Uses.*
III. *Shifting, Springing and Contingent Uses.*
IV. *Trusts.*

SECTION I.

USES BEFORE THE STATUTE OF USES.

- SECTION 437. Pre-statement.
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441. Distinction between Uses and Trusts.
442. How uses may be created.
443. Same — Resulting use.
444. Same — By simple declarations.
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446. What might be conveyed to uses.
447. Incidents of uses.
448. Alienation of uses.
449. Estates capable of being created in uses.
450. Disposition of uses by will.
451. How lost or defeated.

§ 437. **Pre-statement.** — The reader has been prepared, by the classification of estates presented in a previous chapter,¹ for the discussion of interests and estates in lands, which are purely equitable; that is, cognizable solely in a court of equity, and separate and distinct from the legal estate, which is alone recognized in a court of law. Equitable mortgages and liens constitute one class of such inter-

¹ See *ante*, sect. 26.

ests, which have been already considered.¹ The class of equitable interests, which are more properly comprehended under the term estate, is what is known as Uses and Trusts.

§ 438. **Origin and history.** — It is not proposed to give in detail the history of the origin and introduction into the English jurisprudence of Uses and Trusts, but a few words are necessary as explanatory of their character. At common law the only mode of conveying lands was by transmutation of possession. This element was a necessary ingredient of every conveyance, for a common-law title was inseparable from the right of possession. The power of alienation was also very much restricted. It could only be done with the consent of the lord, and even after these restrictions upon conveyancing were removed, the inability to dispose of lands by will, the cumbersome character of the common-law conveyances, and the burdens attached as incidents to a legal estate, such as the rights of dower and curtesy, the possibility of escheat and forfeiture for attainder of treason or corruption of blood, and the innumerable fines and reliefs required by the feudal law of tenure to be paid to the lord, led to the introduction of Uses and Trusts, which relieved the beneficial owner of all these burdens, and gave him an almost absolute property in the lands. A further impetus was given to their general adoption by the prohibitions imposed by the *magna charta* and the statute of *mortmain* upon the ecclesiastical corporations to hold and acquire lands. These statutes, recognizing and relating solely to legal estates, only prevented such corporations from holding legal estates. The ecclesiastics, with their customary astuteness, had the lands conveyed to persons who could take and hold them in trust, to permit the corporations to enjoy the benefit thereof. It may be doubtful whether the ecclesiastics were the first to adopt this mode

¹ See *ante*, sects. 288–295.

of holding lands, but to them certainly may be ascribed the honor of devising the means for the enforcement of the confidence reposed in the person, to whom the land was conveyed. Finally the civil wars between the houses of Lancaster and York, and the increased danger of attainder and confiscation of estates, resulting from participation in these wars upon one side or the other, caused a large portion of the lands of England to be settled in this manner.¹ It is supposed, with good reason therefor, that the doctrine of uses and trusts was derived from the civil or Roman law, and corresponds, in some respects, to what is known in that system of jurisprudence as the *fidei commissum*.²

§ 439. **What is a use?** — A use or trust is a confidence, which acquired under the operation of the rules of equity the character of an estate, reposed in the person holding the legal estate, who is known as the feoffee to use or trustee, that he shall permit the person designated in the conveyance to the feoffee to use or by the legal owner, and who is called the *cestui que use or trust*, to enjoy the rents and profits of the land. The use or trust is the beneficial interest in and issuing out of the land, while the legal title remained in the person who was seised to the use.³ In a

¹ 2 Washb. on Real Prop. 384-386; 1 Spence Eq. Jur., 439-442; Chudleigh's Case, 3 Rep. 123; 2 Pomeroy Eq. Jur., sect. 978.

² 2 Washb. on Real Prop. 386; Bac. Law Tracts, 315; Cornish, Uses, 10. The *fidei commissum* of the Roman law, however, could only be created by will, and was designed to give the beneficial interest in property to those who were otherwise prohibited from taking as devisee. The testator would direct the heir to transfer the estate to the person designated. This trust was then enforced by the courts. It is, therefore, more proper to say that the *fidei commissum* suggested the use, and the mode of enforcing it, than that the use is derived from the Roman law. Saunder's Justinian, 337, 338; 2 Pomeroy Eq. Jur., sects. 976, 977.

³ 2 Washb. on Real Prop. 388; 2 Bla. Com. 330; Bac. Law Tracts, 307; Co. Lit. 271 b, Butler's note, 231, sect. 2; 2 Pomeroy Eq. Jur., sects. 978, 979; 1 Spence Eq. Jur. 439-444; Burgess v. Wheate, 1 W. Bl. 158; Tud. Ld. Cas. 252, 253.

court of law he was deemed the owner, brought all the actions for the protection of the property against trespass, waste and disseisin, and exercised generally the legal rights of an owner.¹ He could even maintain an action of ejectment against the *cestui que use*.² The rights of the *cestui que use* were not recognized in a court of law. He had no standing in that court, and only obtained an ample remedy for the protection of his estate when the court of chancery assumed jurisdiction.³

§ 440. **Enforcement of the use.** — Before the English court of chancery acquired jurisdiction, the *cestui que use* was compelled to rely upon the good faith of the feoffee to use, although there is supposed to have been an inefficient remedy in the spiritual or ecclesiastical courts. But since these courts had no means of enforcing their decrees, and exerted only a spiritual influence over the conscience, the *cestui que use* was practically dependent upon the honesty of his feoffee to use.⁴ The ecclesiastics were, of course, greatly concerned in providing a sufficient remedy for their protection and the enforcement of their uses. The court of chancery was at that time entirely under their control, for the chancellor and other judges of the court were almost always appointed from the clergy. And being learned in the civil law, they readily found a precedent in the enforcement of the *fidei commissum*⁵ of that system of jurisprudence. With this precedent before him, John De Waltham, Bishop

¹ Tud. Ld. Cas. 252; 2 Bla. Com. 330; 1 Spence Eq. Jur. 442; Chudleigh's Case, 1 Rep. 121; 2 Pomeroy Eq. Jur. sect. 979; 2 Washb. on Real Prop. 388.

² 1 Spence Eq. Jur. 442; Tud. Ld. Cas. 253; Chudleigh's Case, 1 Rep. 121.

³ 1 Spence Eq. Jur., 456; Co. Lit. 271 b, Butler's note, 231, sect. 2; Pom. Eq. Jur., sects. 979, 980; Tud. Ld. Cas. 252; Lewin on Tr. 3, 4.

⁴ 1 Spence Eq. Jur. 444; Tud. Ld. Cas. 252; Bac. Law Tracts, 307

⁵ 1 Spence Eq. Jur. 436; Bac. Law Tracts, 315.

of Salisbury, Master of the Rolls, devised the “writ of subpœna,” returnable in chancery, and directed against the feoffee to use, by which he was made to account under oath to the *cestui que use* for the rents and profits he had received from the land.¹ This writ could at first be issued against the *feoffee to use*, but not against his heirs and assigns. Subsequently it was made issuable against the heirs and all alienees of the feoffee, who took with notice of the use.² The court of chancery then for the first time acquired complete jurisdiction over uses and trusts. From that time forward, in the exercise of that jurisdiction, a set of rules has been established for their interpretation and construction, which gave to them, as nearly as it was possible or advisable, the character and incidents of legal estates.³

§ 441. **Distinction between uses and trusts.** — Although the words *uses* and *trusts* were employed before the passage of the Statute of Uses, as if they were synonymous; and although they may be used interchangeably when speaking generally of these equitable estates, as they then prevailed, yet a distinction was made between them according to the permanent or temporary character of the estate. If the right to the rents and profits was permanent — that is, of a long duration — it was called a *use*. If the right was only of a temporary character, or given only for special purposes, it was designated a *trust*.⁴ A more radical difference now exists in the present use of these terms, arising out of

¹ 1 Spence Eq. Jur. 438; 2 Washb. on Real Prop. 389; 1 Pom. Eq. Jur., sects. 428–431.

² 1 Spence Eq. Jur. 445; 2 Washb. on Real Prop. 380; 2 Bla. Com. 329; Burgess v. Wheate, 1 W. Bl. 156; 2 Pom. Eq. Jur. sect. 980.

³ 2 Washb. on Real Prop. 392; 1 Cruise Dig. 341; 1 Spence Eq. Jur. 435; 2 Bla. Com. 331.

⁴ 2 Washb. on Real Prop. 398; 1 Cruise Dig. 246; Tud. Ld. Cas. 255; Sand. Uses, 3, 7; 1 Spence Eq. Jur. 448.

the change made in equitable estates by the Statute of Uses.

§ 442. **How uses may be created — By feoffment.** — Since at common law the ordinary conveyance was feoffment with livery of seisin, operating by transmutation of possession and requiring no evidence in writing of such conveyance, a use might have been created before the Statute of Frauds, when employing this mode of conveyance, by a simple declaration of the feoffor at the time that the feoffee was to hold to the use of some other person.¹ The Statute of Frauds, however, requires uses and trusts as well as legal estates to be evidenced by some writing signed by the party to be charged. At the present day, therefore, an oral declaration will not be sufficient to raise a use.²

§ 443. **Same — Resulting use.** — As a consequence of the introduction of uses, if one makes a conveyance in fee without receiving any good or valuable consideration, equity, presuming that one will not part with a valuable estate without receiving in return a consideration, held that the beneficial or equitable interest remained in or resulted to the grantor. He was supposed to have intended that the use should be reserved to himself. This was called a resulting use. It became, therefore, a general rule that a conveyance of the legal estate in fee without a consideration will not carry with it the beneficial interest.³ But where the estate conveyed was less than a fee, there was no resulting use, as the duties and liabilities attached to an estate for life, for years and in tail,

¹ 1 Spence Eq. Jur. 449; 2 Washb. on Real Prop. 392; 2 Bla. Com. 331.

² Stat. 29 Car. ii, c. 3, sects. 7, 8; 2 Washb. on Real Prop. 500, 501; Saund. Uses, 229; Tud. Ld. Cas. 266.

³ 2 Washb. on Real Prop. 393; 1 Spence Eq. Jur. 451; 2 Bla. Com. 331; Lloyd v. Spillett, 2 Atk. 150; 2 Pom. Eq. Jur., sect. 981; Osborn v. Osborn, 26 N. J. Eq. 385.

were considered a sufficient consideration to prevent the use resulting to the grantor.¹ The use can result only to the grantor and his heirs.² And for the purpose of carrying the use to the feoffee, the smallest nominal consideration was sufficient. It need not be stated in the deed if an actual consideration had passed between the parties; on the other hand, if there is an acknowledgment of the receipt of the consideration in the deed of conveyance, there need be no actual consideration, since the parties to the deed will be estopped from denying it.³ Nor is a consideration necessary where the deed expressly declares to whose use the land shall be held. But if only a part of the use is declared by the deed, the remainder would result to the grantor in the same manner as if no use had been limited, unless the use declared is limited to the grantor, when the remainder will be in the feoffee.⁴ The doctrine of resulting uses has been abolished by statute in some of the States.

¹ 1 Prest. Est. 192; 1 Cruise Dig. 376; 1 Spence Eq. Jur. 452; 2 Washb. Real Prop. 396; Tud. Ld. Cas. 258.

² 2 Washb. on Real Prop. 393, 394; 1 Prest Est. 195; 1 Cruise Dig 373.

³ 1 Spence Eq. Jur. 450, 451; 2 Bla. Com. 329; Tud. Ld. Cas. 255; Lewin on Tr. 27; Squire v. Harder, 1 Paige, 494; Bk. of U. S. v. Houseman, 6 Paige, 526; Titcomb v. Morrill, 10 Allen, 15; 1 Greenl. on Ev. sect. 26; Wilkinson v. Scott, 17 Mass. 257; Griswold v. Messenger, 6 Pick. 517; Bragg v. Geddes, 93 Ill. 89; Bartlett v. Bartlett, 14 Gray, 277; Gerry v. Stimpson, 60 Me. 186; Wilt v. Franklin, 1 Binn. 518; Boyd v. McLean, 1 Johns. Ch. 582; Farrington v. Barr, 36 N. H. 86; Miller v. Wilson, 15 Ohio, 108; Philbrook v. Delano, 29 Me. 410; Maigly v. Hauer, 7 Johns. 341; Shepherd v. Little, 14 Johns. 210; Morse v. Shattuck, 4 N. H. 229; 2 Washb. on Real Prop. 394; Gould v. Linde, 114 Mass. 366; Graves v. Graves, 29 N. H. 129; Cairns v. Colburn, 104 Mass. 274.

⁴ 1 Spence Eq. Jur. 449, 511; 2 Bla. Com. 329; Lloyd v. Spillett, 2 Atk. 150; Bac. Law Tracts, 317; Sand. Uses, 103, 104, 142; Co. Lit. 23 a; Tud. Ld. Cas. 258; 1 Prest. Est. 191, 195; Pibus v. Mitford, 1 Ventr. 372; Tipping v. Cozzens, 1 Ld. Raym. 33; Volgen v. Yates, 5 Seld. 223; Farrington, v. Barr, 36 N. H. 88; Sir Edw. Clerc's Case, 6 Rep. 17; Kenniston v. Leighton, 53 N. H. 311; Graves v. Graves, 9 Fost. 129; Sprague v. Woods, 4 Watts & S. 192; Walker v. Walker, 2 Atk. 68; Lampleigh v. Lampleigh, 1 P. Wms. 112; St. John v. Benedict, 6 Johns. Ch. 116; Capen v. Richardson, 7 Gray, 370; Altham v. Anglesea, 11 Mod. 210; Boyd v. McLean, 1 Johns. Ch.

§ 444. **Same — By simple declarations.** — Not only could uses be raised by a declaration to that effect, made in connection with a feoffment or other common-law conveyance, as above explained, but also by a simple declaration made by the legal owner that he held the land to the use of another. But since a court of equity lends its aid only to the prevention of an injury or wrong (*injuria*), and will not enforce mere voluntary obligations, these declarations, when made independently of a common-law conveyance, had to rest upon a consideration, in order that they might be enforced. If the declaration was made to a stranger a valuable consideration was required, but it need not be a substantial one; while in the case of a declaration to a near blood-relation, a good consideration, natural love and affection, would answer.¹ And under this rule equity always construed a contract of sale or agreement to convey as a declaration to uses, and would enforce it if the requisite consideration was present.²

§ 445. **Who might be feoffees to use and cestuis que use.** — As a general proposition, all persons who could be grantees in a common-law conveyance can be either *feoffees to use* or *cestuis que use*, infants and married women not excepted. The married woman, as *feoffee to use*, would hold the legal estate free from any attaching rights of her husband, and, as *cestui que use*, enjoy the beneficial interest as freely as if she were single. Her husband acquires no rights in the equitable estate, since they attach and relate to only legal estates.³ Corporations can be *cestuis que*

582; *Peabody v. Tarbell*, 2 Cush. 232; *Adams v. Savage*, 2 Salk. 679; *Rawley v. Holland*, 2 Eq. Cas. Abr. 753; 1 Cruise Dig. 376; *Roe v. Popham*, Dougl. (Mich.), 25.

¹ 2 Bla. Com. 329; Co. Lit. 271 b, Butler's note, 231; Tud. Ld. Cas. 268; 1 Spence Eq. Jur. 450; 2 Washb. on Real Prop. 394, 395.

² 2 Washb. on Real Prop. 397; 1 Spence Eq. Jur. 452, 453.

³ Tud. Ld. Cas. 254; 4 Kent's Com. 293; *Egerton v. Brownlow*, 4 H. L. Cas. 206; Saund. Uses, 349; Hill, Trust. 52; *Pinson v. Ivey*, 1 Yerg. 325;

use.¹ It was formerly held that corporations could not be *feoffees to use*, it being supposed impossible to enforce the performance of the use on account of the intangible, soulless character of the corporation. That doctrine has now been exploded, and courts of equity can enforce their decrees just as effectively against corporations as against natural persons. It is, therefore, the prevailing rule in this country that corporations may hold lands as *feoffees to use*, provided the limitations of their charters do not make such a conveyance foreign to the purposes of their creation.²

§ 446. **What might be conveyed to uses.** — Every species of real property, which is comprehended under the terms *lands tenements* and *hereditaments*, both corporeal and incorporeal, may be the subject of conveyance to uses.³ At an early period it was held necessary for the grantor to be possessed of an estate of which seisin could be predicated, in order that a use might be created out of it.⁴ But this doctrine has long since been abandoned, and chattels, both real and personal, can now be settled to uses. But since a mortgage is treated in equity as a lien instead of an estate in lands, there can be no conveyance of it to uses.⁵

§ 447. **Incidents of uses.** — As uses, considered as estates in lands, were the mere creatures of equity, and acquired in the early days of their existence no actual rec-

Springer v. Berry, 47 Me. 338; Claussen v. La Franz, 1 Iowa, 237; 2 Washb. on Real Prop. 391, 392; 1 Cruise Dig. 340. It is here meant that the husband's rights during coverture do not attach to the wife's equitable estate. But he has curtesy in such estates, unless expressly excluded. See *ante*, sect. 105.

¹ 1 Cruise Dig. 354; 2 Washb. on Real Prop. 391; Tud. Ld. Cas. 254.

² Ang. & Ames on Corp., ch. II., sects. 6-8; 2 Washb. on Real Prop. 391; Vidal v. Girard, 2 How. 127; Sutton v. Cole, 3 Pick. 232; Phillip's Academy v. King, 12 Mass. 546.

³ 2 Washb. on Real Prop. 391; 2 Bla. Com. 331.

⁴ 2 Bla. Com. 331; 1 Cruise Dig. 340; Tud. Ld. Cas. 259.

⁵ 2 Washb. on Real Prop. 408; Merrill v. Brown, 12 Pick. 220.

ognition in a court of law, the court of chancery, in establishing rules for the government and construction of them, while following to some extent the analogies of the law in relation to legal estates, adopted only such rules of the common law as were consistent with the intended character of this equitable estate. It, therefore, discarded the doctrines of feudal tenure and seisin altogether. Nor did the court recognize in uses the rights of dower and curtesy. Uses were also held to be not liable to levy and sale under execution; nor were they forfeited to the crown upon attainder until the statute of 33 Hen. VIII., ch. 20, sect. 2.¹ But they were descendible to the heirs, in conformity with the common law of descent.²

§ 448. **Alienation of uses.** — For the same reasons, the restrictions imposed upon the common-law power of alienation were not applied to uses. There is no limitation upon the alienation of uses, except that imposed by the Statute of Frauds. Before the passage of that statute no formal assignment in writing was required; a simple direction to the trustee to pay over the rents and profits to the assignee was sufficient. These directions the trustee was bound to follow, and obedience could be enforced in like manner as in the case of the original *cestui que use*.³ But the assignment of the use necessarily had no effect upon the legal estate in the trustee, unless he joined in the conveyance.⁴ And then the formalities required in all common-law con-

¹ 2 Washb. on Real Prop. 395, 399; 1 Spence Eq. Jur. 455, 456, 460; 1 Washb. on Real Prop. 297; 2 Bla. Com. 331; Jackson v. Catlin, 2 Johns. 261. Uses are now very generally held to be subject to the husband's right of curtesy. See *ante*, sect. 105.

² 2 Bla. Com. 329; 1 Spence Eq. Jur. 454.

³ 1 Cruise Dig. 342; 1 Spence Eq. Jur. 454. The Statute of Frauds required all trusts and confidences to be proved by some writing. 29 Car. II., ch. 3.

⁴ 2 Washb. on Real Prop. 396; 2 Bla. Com. 331.

veyances must have been complied with in order to pass the legal estate.

§ 449. **Estates capable of being created in uses.** — When one has an unlimited use, *i.e.*, a use in fee, whether alone or merged in the legal estate, there is no limitation upon the number and kinds of estates which might be carved out of it. Not only may all the estates known in the common law be created, such as in tail, for years, for life, in remainder vested or contingent, upon condition and upon limitation,¹ but other estates and interests may be limited which are unknown to the common law, and violate its most inflexible rules. Thus an estate in freehold in the use may be created to commence in the future without a particular estate to support it, whether it be vested or contingent. Or the grantor may limit the use in such a manner as to pass from one to another upon the happening of a contingency; or he may reserve to himself or grant to another the power to divest the present *cestui que use* and vest the use in another to be appointed, or simply by such destruction of the prior use to cause the use to revert to the grantor. These limitations were impossible at common law.² And in construing the limitations of uses, the strict technical rules are not observed, the intention governing in each case. A fee might, therefore, be created in the use without an express limitation to heirs, if the intention to create such an estate is manifested in any other way.³

§ 450. **Disposition of uses by will.** — Under the feudal system lands could not be disposed of by will. But uses

¹ 1 Spence Eq. Jur. 455; 1 Cruise Dig. 343; 2 Washb. on Real Prop. 397

² 2 Washb. on Real Prop. 397; 398; 1 Cruise Dig. 343; 1 Spence Eq. Jur. 455; Chudleigh's Case, 1 Rep. 135; Shelley's Case, 1 Rep. 101; Fearne Cont. Rem. 284.

³ 1 Spence Eq. Jur. 452; Td. Lud. Cas. 253; 2 Washb. on Real Prop. 395.

were held to be capable of devise without limitation; and until the passage of the Statute of Wills, 32 Hen. VIII., which made lands devisable by law, as they were under the Saxon law before the Norman conquest, it was a common custom to convey lands to the use of the grantor, which he could then dispose of by will as well as by deed. The Statute of Wills obviated the necessity of such a conveyance in respect to all persons who were empowered by that statute to devise lands. As married women were expressly excluded from the benefit of the statute, this practice of conveying to uses to enable a disposition by will still obtained as to them. The will in such cases only operates as an assignment or devise of the use, or, if it be executed by means of a power of appointment, as a declaration or appointment of a use, and the legal estate remains unaffected in the hands of the trustee. But in chancery the equitable interests thus acquired by the devisee would receive as complete a protection as those of an assignee or grantee *inter vivos*.¹

§ 451. **How lost or defeated.** — The enforcement, and hence the validity of a use depends upon a privity of estate and person, existing between the feoffee and *cestui que use* in relation to the land. Before the Statute of Uses any act of the feoffee by which this privity was destroyed would defeat the use also. If the feoffee lost his seisin by being disseised, or he disposed of the land by deed to a purchaser for consideration and without notice of the use, the use would be defeated, whether it was vested or contingent, in possession or in remainder. But a conveyance to one with notice, or without consideration, or a descent of the lands to the heirs of the feoffee, would not affect the use. The use could still be enforced against the assignee or heir.²

¹ Co. Lit. 271 b, Butler's note, 231; Tud. Ld. Cas. 268; 2 Bla. Com. 329; 2 Washb. on Real Prop. 395, 396; 6 Cruise Dig. 3, 4.

² Co. Lit. 371 b, Butler's note, 231, sect. 2; Tud. Ld. Cas. 254; Lewin on Tr. 2; 2 Washb. on Real Prop. 389, 400; 1 Spence Eq. Jur. 456; Chud-

Where the feoffee was disseised, he alone could recover the seisin according to the common law, and the *cestui que use* could not enforce the use against the disseisor. And, although even now the disseisin of the trustee is likewise a disseisin of the *cestui que use*, and, if continued for a sufficient length of time, would bar both the equitable and legal estates, yet at present the *cestui que use* may, upon his own motion, and without the co-operation of his trustee, have the disseisor declared a trustee, holding the legal estate subject to the use.¹

leigh's Case, 1 Rep. 120; Dennis v. McCagg, 32 Ill. 445; Hallett v. Collins, 10 How. 174; Den v. Troutman, 7 Ired. 155; Burgess v. Wheate, 1 W. Bl. 156. Cholmondely v. Clinton, 2 Meriv. 358.

¹ See preceding note; 1 Spence Eq. Jur. 501; 1 Cruise Dig. 403.

SECTION II.

USES UNDER THE STATUTE OF USES.

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470. Cases in which the statute will not operate.

§ 459. **History of the Statute of Uses.**—As has been stated in the preceding section, uses became a very common mode of limiting estates. In consequence of the equitable and uncertain character of the use, and its freedom from the burdens of common-law estates, its popularity gave rise to the constant perpetration of frauds upon the legal rights of others. “Heirs were unjustly ^{by} inherited; the king lost his profits of attainted persons, aliens born, and felons; lords lost their wards, marriages, reliefs, heriots, escheats, aids; married men lost their tenancies by the curtesy, and women their dower; purchasers were defrauded; no one knew against whom to bring his action, and manifest perjuries were committed.”¹ Several attempts were made by the enactment of statutes to check these abuses, notably a statute in the reign of Richard III. (1 R. III., ch. 1), but to no avail. Means of avoiding the operation of these statutes were soon discovered, and the abuses were as

¹ 1 Sugd. Pow., (ed. 1856), 78.

grievous after as they were before their enactment. Finally the statute of 27 Hen. VIII., ch. 10, the celebrated Statute of Uses, was passed by parliament.¹ The evident intention of the legislator was to abolish the doctrine of uses altogether by the statutory transfer of the legal estate from the *feoffee to use* to the *cestui que use* in every case, whatever may be the limitations upon the use. But the statute met with the most determined opposition from the bench and bar. Notwithstanding the many alleged frauds which could be committed by an abuse of the doctrine, public sentiment was opposed to its absolute destruction, and was in favor of preserving the power of creating an equitable estate in the nature of a use. And notwithstand-

¹ The statute enacted that "where any person or persons stood or were seized, or at any time thereafter should happen to be seized, of and in any honours, castles, manors, lands, tenements, rents, services, reversions, remainders, or other hereditaments, to the use, confidence or trust of any other person or persons, or of any body politic, by reason of any bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will or otherwise, by any manner of means whatsoever it be; that in every such case all and every such person and persons and bodies politic, that have or hereafter shall have, any such use, confidence or trust, in fee simple, fee tail, for term of life, or for years or otherwise, or any use, confidence or trust in remainder or reverter, shall from henceforth stand and be seized, deemed and adjudged in lawful seisin, estate and possession, of and in the same honours, castles, manors, lands, tenements, rents, services, reversions, remainders, or other hereditaments, with their appurtenances, to all intents, constructions and purposes in the law, of and in such like estates as they had or shall have in the use, confidence or trust of or in the same; and that the estate, title, right and possession, that was in such person or persons, that were or hereafter shall be seized of any lands, tenements or hereditaments to the use, confidence or trust of any such person or persons, or of any body politic, be from henceforth clearly deemed and adjudged to be in him or them that have or hereafter shall have such use, confidence or trust, after such quality, manner, form and condition as they had before, in or to the use, confidence or trust that was in them." This statute has either been adopted in the different States of this country as part of the common law, or substantially re-enacted, so that it prevails generally throughout the United States. 2 Pom. Eq. Jur., sect. 530, note 1; Perry on Tr. 299; Guest v. Farley, 19 Mo. 147; Booker v. Carlisle, 14 Bush, 154; Sherman v. Dodge, 28 Vt. 26, 31; Bryan v. Bradley, 16 Conn. 474; Bowman v. Long, 26 Ga. 142; McNab v. Young, 81 Ill. 11; Gorham v. Daniels, 23 Vt. 600.

ing the remedial character of the statute, it received at the hands of the profession a strict and technical construction, and was permitted to operate only so far as it was impossible to render nugatory its express provisions. Instead of destroying uses, the statute only established them upon a firmer basis. By a remarkable course of judicial construction — it was practically legislation — the modern doctrine of trusts arose, which obtains to this day, and which includes every species of equitable estate which, under the statute, is capable of creation without being merged into the legal estate.

§ 460. **When statute will operate.** — The Statute of Uses will only operate upon a conveyance to uses, and transfer the legal to the holder of the equitable title, when the following three elements are present: *First*, a person seised to a use, and *in esse*; *second*, a *cestui que use in esse*; and *third*, a use *in esse*.¹

§ 461. **A person seised to a use and in esse.** — Any person who was capable of being seised before the statute would satisfy the requirements. And although at first it was supposed and held, that aliens and corporations could not be seised to uses, at the present day there is no such restriction. In regard to alien feoffees to use, the general rules of equity relating to trusts will apply, and prevent the failure of the use because of their incapacity to hold the seisin.² And in this country corporations are included under the term “persons,” and may be seised to uses if the limitations of their charters permit of such holding.³

¹ 1 Cruise Dig. 349; 2 Washb. on Real Prop. 407.

² 2 Washb. on Real Prop. 408; 1 Cruise Dig. 349; Bac. Law Tracts, 347, 348.

³ Sutton v. Cole, 3 Pick. 240; U. S. v. Amedy, 11 Wheat. 392; Vidal v. Girard, 2 How. 127; Phillip's Academy v. King, 12 Mass. 546; Ang. & Ames on Corp., ch. V., sects. 6-8; Greene v. Dennis, 6 Conn. 293; First Cong.

But the person seised must be *in esse*. If by reason of the limitations of the conveyance the *feoffee to use* is uncertain, as he would be if the legal estate upon which the use depends is a contingent remainder, the statute cannot operate until the contingency happens, upon which the remainder becomes vested.¹

§ 462. **Freehold necessary.** — Seisin cannot be predicated of leasehold estates. In order, therefore, that the statute may take effect, the estate in the *feoffee to use* must be a freehold. All leaseholds held to uses remain unexecuted as before the statute, and the uses are enforceable only in a court of equity. It was once supposed that the freehold must be greater than a life estate; but it is now held that any freehold estate is sufficient, including life estates and all estates of inheritance.² If the freehold, upon which the use depends, is not commensurate with the use, the use will be valid, and will be executed, only as far as the legal estate extends. If the legal estate in the *feoffee* is only a life estate, the use is good only for that time, even though the

Soc. v. Atwater, 23 *Id.* 34; *Mayor, etc., v. Elliott*, 3 *Rawle*, 170; *Bethlehem Borough v. Perseverance Fire Co.*, 81 *Pa. St.* 445; *Trustees, etc., v. King*, 12 *Mass.* 546-553; *First Parish, etc., v. Cole*, 3 *Pick.* 232-237; *Wade v. Am. Ool. Soc.*, 7 *Smed. & M.* 697; *Ayres v. M. E. Church*, 3 *Sandf.* 351; *Matter of Howe*, 1 *Paige*, 214. But if the use or trust is foreign to the purposes of its institution, the corporation cannot hold the seisin or legal estate. A new trustee must be appointed to take its place. *Matter of Howe*, 1 *Paige*, 214; *Sloan v. McConahy*, 4 *Ohio*, 157; *Jackson v. Hartwell*, 8 *Johns.* 422; *Trustees, etc., v. Peaslee*, 15 *N. H.* 317; *Chapin v. School Dist.*, 36 *N. H.* 445; *Farmer's Loan, etc., Co. v. Carroll*, 5 *Barb.* 613; *Bliss v. Am. Bible Soc.*, 2 *Allen*, 334; *Montpelier v. East Montpelier*, 29 *Vt.* 12; *Mason v. M. E. Church*, 27 *N. J. Eq.* 47.

¹ 2 *Washb. on Real Prop.* 408; *Bac. Law Tracts*, 349.

² 1 *Cruise Dig.* 350, 351, 353; *Tud. Ld. Cas.* 257-259; *Galliers v. Moss*, 9 *B. & C.* 267; 1 *Prest. Est.* 190; 1 *Spence Eq. Jur.* 466-490; *Ashhurst v. Givens*, 5 *Watts & S.* 327; *Merrill v. Brown*, 12 *Pick.* 220; *Gilbertson v. Richards*, 5 *H. & N.* 454; *Franciscus v. Reigart*, 4 *Watts*, 118; 2 *Pom. Eq. Jur.* 984; *Hopkins v. Hopkins*, 1 *Atk.* 591; 2 *Washb. on Real Prop.* 408, 409.

limitation of the use be in terms a fee simple.¹ But it is probable at the present day that the rule would be so far relaxed as to make the legal estate by construction co-extensive with the use, unless a smaller estate is expressly limited, in conformity with the rule governing the same question in its connection with the doctrine of trusts.² And an estate tail has been held sufficient to support a use in fee simple.³

§ 463. **Use upon a use.** — Since seisin requires a legal estate, and the person, out of whom the legal estate is to be drawn by the statute and transferred to the *cestui que use*, was required to be seised, the courts have held that the statute can only execute the first use, and can have no effect upon the second or other use depending upon the first. For example, an estate is limited to the use of A. to the use of B. The statute can execute the use in A., but cannot go further and transfer the legal estate to B., the final and actual *cestui que use*, because by the strict construction of the statute the legal estate can only pass from persons who were seised in the legal estate under the deed. A. had only a use, and therefore was not seised. But inasmuch as after the execution of the use the *cestui que use* was to hold the legal estate in “such quality, manner, form and condition” as he had in the use, A. in the case supposed would hold

¹ Tud. Ld. Cas. 259; Sandf. on Uses, 109; Jenkins v. Young, Cro. Car. 230; 2 Washb. on Real Prop. 409.

² Doe v. Nichols, 1 B. & C. 336; Doe v. Ewart, 7 A. & E. 636; Norton v. Norton, 2 Sandf. 296; Barker v. Greenwood, 4 M. & W. 421; Adams v. Adams, 6 Q. B. 860; Att’y-Gen. v. Props., etc., 3 Gray, 48; Cleveland v. Hallett, 6 Cush. 407; Farquharson v. Eichelberger, 15 Md. 73; Coulter v. Robertson, 24 Miss. 278; Ward v. Amory, 1 Curt. C. Ct. 419; Morton v. Barrett, 22 Me. 257; Smith v. Metcalf, 1 Head, 64; Renzichausen v. Keyser, 48 Pa. St. 351. See *post*, sect. 504.

³ 1 Cruise Dig. 352; 2 Washb. on Real Prop. 409.

the legal estate to the use of B., and accountable to B. in equity for the rents and profits.¹

§ 464. *Feoffee and cestui que use — Same person.* — Where the *feoffee to use* and the *cestui que use* are the same person, there is a merger of the equitable in the legal estate without the aid of the Statute of Uses. He takes an absolute estate at common law, unless such a merger would defeat the purposes of the conveyance.² Nor would there be a merger, if the use to the feoffee was not as extensive as the legal estate which is conveyed to him, as where the estate is a fee, and his use is a life interest, or he takes the use jointly with another. In such cases the use could only

¹ 2 Washb. on Real Prop. 406, 409, 457, 460, 461; Tyrrell's Case, Dyer, 155, 1 Co. Rep. 136 b, 187; Croxall v. Shererd, 5 Wall. 282; Wyman v. Brown, 50 Me. 157; Hopkins v. Hopkins, 1 Atk. 591; Willett v. Sandford, 1 Ves. sr. 186; 2 Pom. Eq. Jur., sect. 985. The rule above enunciated, that a use cannot be limited upon a use, has been abolished by statute in New York, California, Michigan, Minnesota, and Wisconsin. See *post*, sect. 470, note. And it has also been disapproved and adversely commented on by the Massachusetts court. Thatcher v. Omans, 3 Pick. 521, 528. But it is, perhaps, generally recognized in this country wherever it has not been changed by statute. And, basing their conclusions upon this doctrine, the courts have held that where in a deed of bargain and sale the estate is limited to the bargainee to the use of another, it is such a use upon a use as will not be executed by the statute. See Guest v. Farley, 19 Mo. 147; Jackson v. Myers, 3 Johns. 388, 396; Jackson v. Cary, 16 Johns. 302; Croxall v. Shererd, *supra*; Price v. Sisson, 2 Beas. 168. This is, however, only the case with a pure bargain and sale deed. When such a limitation occurs in a modern deed of conveyance, which might be treated as a common-law conveyance, as well as a bargain and sale, and such is supposed to be the case where the operative words are "grant, bargain and sell," or "give, grant, bargain and sell," the use would presumably be executed by the statute, the bargainee or grantee having acquired the seisin and the legal estate by force of the deed, as a common-law conveyance. See *post*, sect. 782.

² 2 Prest. Conv. 481; Co. Lit. 271 b, Butter's note, 231; 1 Cruise Dig. 354; Tud. Ld. Cas. 257; Jackson v. Cary, 16 Johns. 302; Jenkins v. Young, Cro. Car. 231; Sammes' Case, 13 Rep. 56; Doe v. Passingham, 6 B. & C. 305, 317; Orne's Case, L. R. 8 C. P. 281.

be executed by the statute.¹ But, nevertheless, if a use is limited upon the use of the feoffee, it will be construed such a limitation of a use upon the use as to preclude the execution of the second use. Thus, in a conveyance to A. to the use of A. to the use of B., although, in the absence of the use to B., A. would have been held to be in possession of the legal estate at common law by the merger of the equitable in the legal estate, yet this express limitation to his use will prevent the operation of the statute upon the use in B. A. would hold the legal estate, and the use in B. would remain unexecuted.² In some of the States this doctrine concerning the effect of a use upon a use has been abolished by statute, and the legal title is made to pass through all the intermediate *cestuis que use* until the final and actual beneficiary is reached, when it becomes vested in him.³

§ 465. **A use in esse.** — It matters not whether the use is one in possession, reversion, or remainder, if the vesting of the title thereto is not contingent, it is a use *in esse*, and will be executed at once by the statute. If the use is one in possession it will be executed immediately, both in title and in possession. If it is to commence in the future it is called, according to the terms of the limitation, a contingent, springing, or shifting use, and will be considered in a subsequent section.⁴ Nor is it important in what manner the use is created, whether by express limitation or by law,

¹ 1 Cruise Dig. 357; Tud. Ld. Cas. 258; Sammes' Case, 13 Rep. 56; Sand. on Uses, 94, 96.

² Doe v. Passingham, 6 B. & C. 305, 317; Williams on Real Prop. 161; Tud. Ld. Cas. 268; Doe v. Martin, 4 T. R. 89; 2 Smith Ld. Cas. 454; Whetstone v. Bury, 2 P. Wms, 146; 1 Sugden on Pow. 168, 169; Moore v. Shultz, 13 Pa. St. 98; Hayes v. Tabor, 41 N. H. 521, 526; Atty.-Gen. v. Scott, Cas. temp. Talb. 138; Price v. Sisson, 2 Beas. 168, 173, 174; 2 Bla. Com. 336; Franciscus v. Reigart, 4 Watts, 118. *Contra*, Hurst v. McNiell, 1 Wash. C. Ct. 70.

³ See *ante*, sect. 463, note; and *post*, sect. 470, note.

⁴ See *post*, sects. 478, 485.

as in the case of a resulting use, however the use arises, if it is *in esse*, *i.e.* vested, the statute will execute it.¹ If the use is contingent, the use is not *in esse* until the happening of the contingency upon which its vesting depends, when it will be executed in the same manner as if it had been vested from the time of its creation.²

§ 466. **Cestui que use in esse.** — There must, furthermore, be some ascertained person *in esse* who is to take and who can take the use under the conveyance. As a general proposition, subject to an exception to be mentioned elsewhere,³ the character of the *cestui que use* will not affect the execution of the use. Any person *in esse* will fulfil the requirements of the statute.⁴ But if the *cestui que use* is not *in esse*, or not ascertained, the use is future and contingent, and the operation of the statute is suspended until the *cestui que use* is known.⁵ If a future use is to vest upon the happening of some contingency independent of human action, it is called a contingent, springing, or shifting use. But if the uncertainty or contingent character is to be settled by the act of some person or persons designated by the grantor or testator, then the limitation, although in fact nothing more than a contingent future use, receives the name of a power.⁶

¹ 1 Cruise Dig. 358; *Hopkins v. Hopkins*, 1 Atk. 591; *Chudleigh's Case*, 1 Rep. 126; *Osman v. Sheafe*, 3 Lev. 370; *Doe v. Salkeld*, Willes, 674; 2 Smith's Ld. Cas. 288, 297; *Hays v. Kershaw*, 1 Sandf. Ch. 258; Tud. Ld. Cas. 262.

² *Chudleigh's Case*, 1 Rep. 126; Tud. Ld. Cas. 262; *Shep. Touch. Prest.* ed. 529 n; Sand. on Uses, 110; 1 Sugden Pow. 41. See *post*, sects. 479, 481.

³ See *post*, sect. 469.

⁴ 1 Cruise Dig. 354; 2 Washb. on Real Prop. 410.

⁵ 1 Cruise Dig. 354; 2 Bla. Com. 336; *Chudleigh's Case*, 1 Rep. 126; *Jackson v. Myers*, 3 Johns. 388; *Reformed Dutch Church v. Veeder*, 4 Wend, 494; *Ashhurst v. Given*, 5 Watts & L. 323; *Miller v. Chittenden*, 2 Iowa, 371; *Shapleigh v. Pilsbury*, 1 Me. 271; *Sewall v. Cargill*, 15 Me. 414. See *post*, sect. 479.

⁶ 2 Washb. on Real Prop. 420; *Shep. Touch. Prest.* ed. 529 n.

§ 467. **Words of creation and limitation.** — No special form of expression or set of words is necessary in the creation of uses, provided such words are used, as clearly show the intention of the grantor that a use was to be declared in favor of another. The Statute of Uses employs the words “use, confidence, or trust,” and it would accordingly be safer to adopt one of these words, although it is not necessary.¹ Although the employment of technical words of limitations was not necessary in the creation of a use before the statute,² and since the statute they are not always necessary in the limitation of equitable estates which are not executed by the statute, and which properly fall under the head of trusts,³ yet if the statute does operate the use will be valid for the purpose of execution, only so far as the words of limitation are capable of limiting similar estates at common law. The word “heirs” is therefore necessary to a use in fee, where the common law in respect to words of limitations has not been changed by statute, and its absence cannot be supplied by words of similar import. A conveyance, therefore, to the use of A. and the issue of his body would be neither an estate tail nor a fee simple, and A. would take only a life estate.⁴

§ 468. **Active and passive uses and trusts.** — Both before and after the passage of the statute, uses and trusts

¹ 2 Washb. on Real Prop. 411; Tud. Ld. Cas. 258.

² 1 Spence Eq. Jur. 452; 1 Cruise Dig. 343; Tud. Ld. Cas. 253; 2 Washb. on Real Prop. 395.

³ Villiers v. Villiers, 2 Atk. 71; Fisher v. Fields, 10 Johns. 505; Newhall v. Wheeler, 7 Mass. 189; Cleveland v. Hallett, 6 Cush. 406; Shaw v. Weigh, 2 Stra. 803; Gibson v. Montford, 1 Ves. sr. 485; Oates v. Cooke, 3 Burr, 1684; Att’y-Gen. v. Props. 3 Gray, 48. See *post*, sect. 504.

⁴ Tud. Ld. Cas. 261; 1 Cruise Dig. 354; Sand. on Uses, 122; 2 Washb. on Real Prop. 380. In most of the States the common law in respect to the employment of technical words of limitation has been abolished by statute. The above rule, therefore, possesses very little practical importance. See *ante*, sect. 37.

have been divided into active and passive. Where the *feoffee to use* was required to perform some duty in respect to the estate, the use was an active one. Where the feoffee had nothing to do but to hold the legal title and seisin for the support of the use, it was called passive. Now, since the feoffee can perform these duties only as long as he retains the legal estate, the statute could not execute an active use or trust without defeating the express purpose and intention of the grantor. The courts, therefore, held that it was not the will of the Legislature to execute active uses.¹ And under the strict construction of the statute the slightest, most unimportant duty in the trustee would prevent the operation of the statute.²

§ 469. *Uses to married women.*—So also where the purpose of the trust is that the *cestui que use*, a married woman, should hold and enjoy the estate for her own separate use, the statute will not execute the use. For the execution of the use would give to the husband control over

¹ 2 Washb. on Real Prop. 467. See note under sect. 470.

² Thus, the statute was held not to execute the use, where the trustee was directed to sell or dispose of the property—to collect and pay over the rents and profits—to have the active management of the estate—to permit the *cestui que use* to receive the net profits—to apply the profits to the maintenance of the *cestui que use*—to pay annuities out of the rents, or to receive the rents and allow them to accumulate. In any such case, the legal estate being held necessary to the performance of the trustee's duty, the statute could not operate, and the use remained an equitable estate, to be enforced by the courts of equity. 1 Prest Est. 185; Co. Lit. 290 b, note 249, sect. 6; 1 Cruise Dig. 385; Doe v. Briggs, 2 Taunt. 109; Nevil v. Saunders, 1 Vern. 415; Bass v. Scott, 2 Leigh, 356; Exeter v. Odiorne, 1 N. H. 232; Posey v. Cook, 1 Hill (S. C.) 413; Norton v. Leonard, 12 Pick. 152–158; Newhall v. Wheeler, 7 Mass. 189; Morton v. Barrett, 22 Me. 257; Schley v. Lyon, 6 Ga. 530; Plenty v. West, 6 C. B. 201; Doe v. Homfray, 6 A. & E. 206; Pullen v. Rianhard, 1 Whart. 514, 520; Barnett's App., 46 Pa. St. 398; Fay v. Taft, 12 Cush. 448; Smithwick v. Jordan, 15 Mass. 113; Lancaster v. Dolan, 1 Rawle, 231; Jones v. Say and Seal, 1 Eq. Cas. Abr. 383; Peter v. Beverley, 10 Pet. 532; Elliott v. Fisher, 12 Sim. 505; Craig v. Leslie, 3 Wheat. 563; Gott v. Cooke, 7 Paige, 521; Cooper v. Whitney, 3 Hill, 95.

the property and its rents and profits during coverture, and his common-law right of curtesy would attach because of her disability to hold a legal estate free from his control.¹ But it is to be presumed that in those States where the disability of married women is removed, and they are permitted to hold and dispose of property as if they were single, the

¹ 1 Cruise Dig. 385; *Harton v. Harton*, 7 T. R. 653; *Steacy v. Rice*, 27 Pa. St. 75; *Bush's App.*, 33 Pa. St. 85; *Nevill v. Saunders*, 1 Vern. 415; *Ware v. Richardson*, 3 Md. 504; *Williams v. Holmes*, 4 Rich. Eq. 495; *Lines v. Darden*, 5 Fla. 78; *Magniac v. Thompson*, 1 Baldw. 63. And in making a conveyance to the separate use of a married woman, her power of alienation may, by a special clause, be entirely taken away during the continuance of the marriage, and this restriction will revive upon any subsequent marriage, if the trust is itself revived by such second marriage. *Hawkes v. Hubback*, L. R. 11 Eq. 5; *In re Gaffee's Trusts*, 1 Macn. & G. 541; *Tullett v. Armstrong*, 4 My. & Cr. 377; *Waters v. Tazewell*, 9 Md. 291; *Fellows v. Tann*, 9 Ala. 999; *Shirley v. Shirley*, 9 Paige, 363; *Fears v. Brooks*, 12 Ga. 195; *Baggett v. Meux*, 1 Phil. 627. But see *Dubs v. Dubs*, 31 Pa. St. 149; *Miller v. Bingham*, 1 Ired. 423. In the absence of such a restraining clause, in England and some of the States, a married woman is to be treated, in respect to her separate property, as a *feme sole*, and she may dispose of the equitable estate as she pleases. *Fettiplace v. Gorges*, 1 Ves. 46; *Rich v. Cockrell*, 9 Ves. 69; *Wagstaff v. Smith*, 9 Ves. 520; *Sturgis v. Corp.*, 13 Ves. 190; *Major v. Lausley*, 2 Russ. & My. 357; *Essex v. Atkins*, 14 Ves. 542; *Stead v. Nelson*, 2 Beav. 245; *Dyett v. North American Coal Co.*, 20 Wend. 570; 7 Paige Ch. 1; *Powell v. Murray*, 2 Edw. Ch. 636; *Gardner v. Gardner*, 22 Wend. 526; *Yale v. Dederer*, 18 N. Y. 269; *Imlay v. Huntington*, 20 Conn. 175; *Frery v. Booth*, 4 Am. Law Reg. (N. S.) 441, and note; *Leaycraft v. Hedden*, 3 Green Ch. 551; *Wyly v. Collins*, 9 Ga. 223; *Cooke v. Husbands*, 11 Md. 492; *Chew's Adm. v. Beall*, 13 Md. 348; *McCroan v. Pope*, 17 Ala. 612; *Collins v. Larenburg*, 19 Ala. 685; *Coleman v. Woolley*, 10 B. Mon. 320; *Hardy v. Van Harlingen*, 7 Ohio (N. S.) 208; *Whitesides v. Cannon*, 23 Mo. 457; *Segoud v. Garland*, 23 Mo. 547; *Frazier v. Brownlow*, 3 Ired. Eq. 237; *Newlin v. Freeman*, 4 *Id.* 312. In a number of the states, however, the English rule has been discarded, and the contrary doctrine maintained that the married woman has no power over her separate estate, except what is expressly granted or reserved to her in the deed of settlement. *Ewing v. Smith*, 3 Desau. 417; *Reed v. Lamar*, 1 Strobb. Eq. 27; *Calhoun v. Calhoun*, 2 Strobb. 231; *Magwood v. Johnson*, 1 Hill Ch. 228; *Lancaster v. Dolan*, 1 Rawle, 231; *Wallace v. Coston*, 9 Watts, 137; *Thomas v. Folwell*, 2 Whart. 11; *Patterson v. Robinson*, 1 Casey, 81; *Metcalf v. Cook*, 2 R. I. 355; *Williamson v. Beekham*, 8 Leigh, 20; *Morgan v. Elam*, 9 Yerg. 375; *Marshall v. Stephens*, 8 Humph. 159; *Doty v. Mitchell*, 9 Smed. & M. 447; *Montgomery v. Agricultural Bk.*, 10 Smed. & M. 567.

reason failing, the rule would also fail, and the statute would execute the use.¹

§ 470. **Cases in which the statute will not operate.**—To recapitulate, the following are the principal cases in which the statute will not execute the use: 1. Uses in chattel interests. 2. A use upon a use. 3. Contingent uses, whether the contingency depends upon the uncertainty of the *cestui que use*, or the use itself. 4. Active uses or trusts. 5. Uses to married women. Every other use will be executed immediately upon their creation, the *feoffee to use* acting merely as a conduit for the transfer of the seisin to the *cestui que use*. Contingent uses are executed when they become vested, while the other classes of uses above enumerated remain throughout their entire duration unexecuted, and enforced as trusts by chancery.²

¹ So it was held in *Sutton v. Aiken*, 62 Ga. 733; *Bratton v. Massey*, 15 S. C. 277; *Bayer v. Cockerill*, 3 Kan. 292.

² As has been remarked in a preceding note, the English Statute of Uses has been superseded in some of the States by modern statutes, materially different in their operation from the old statute. New York first set the example in 1848. The statute of New York abolishes all express trusts heretofore known, and enumerates the classes of active trusts which can be created. All other trusts, and particularly passive trusts, are declared to be legal estates, and the seisin vests in the *cestui que use* or *trust* by force of the statute. 1 Rev. Stat. N. Y. p. 727, sects. 45, 46, 47, 48, 49, 50. In New York, therefore, all uses are converted into legal estates, except the express trusts enumerated in the statute, and trusts arising by implication of law. 1 R. S. N. Y. 728, sects. 51, 52, 53, 55; *Leggett v. Perkins*, 2 N. Y. 297; *Downing v. Marshall*, 23 N. Y. 377; *Ring v. McCown*, 10 N. Y. 268; *Garfield v. Hatmaker*, 15 N. Y. 475; *Lounsbury v. Pardy*, 18 N. Y. 515; *Levy v. Brush*, 45 N. Y. 595; *Marvin v. Smith*, 46 N. Y. 571. The future contingent uses become, by operation of the statute, future contingent estates of a legal character, and the common law was so changed as to admit of the limitation of legal estates, which were before only possible as the limitation of a use. 1 R. S. N. Y. 724, sects. 16, 17, 18, 19. This legislation has, in substance, been followed in California, Michigan, Minnesota, and Wisconsin. Cal. Civ. Code, sects. 817, 857, 863, 867, 869, 879; 2 Comp. Laws, Mich. (1871), 1331; Gen. Stat. Minn. (1878), p. 553, sect. 11; 2 Rev. Stat. Wis., p. 1129, sect. 11. In these States, therefore, the foregoing presentation of uses under the Statute of Uses, as well as the subsequent section on future and contingent uses, must be taken with the qualifications arising under the local statutes prevailing there.

SECTION III.

CONTINGENT, SPRINGING, AND SHIFTING USES

SECTION 478. Future uses.

479. Contingent future uses — How supported.

480. Importance of the question.

481. The solution of the question

482. Contingent uses.

483. Springing uses.

484. Shifting uses.

485. Future uses in chattel interests.

486. Shifting and springing uses — How defeated.

487. Incidents of springing and shifting uses.

§ 478. **Future uses.** — It has been explained that a use could be limited to commence *in futuro* with or without a preceding estate in the use to support it, and even in derogation of the preceding estate, and that it may be either vested or contingent.¹ If it is a vested use the statute will operate immediately and convert it into a legal estate, having the characteristics of a vested estate in reversion. But if the use is contingent the operation of the statute is suspended until the use vests or comes *in esse*. These future uses are divided into contingent, springing, and shifting uses, and will here be explained in the order named.

§ 479. **Contingent future uses — How supported.** — In a conveyance, where there is a contingent use of limited duration, and consequently there are other vested uses, the latter are executed *eo instanti*, whether they are created by express limitation or arise by operation of law under the doctrine of resulting uses; while the contingent use remains unexecuted until the contingency happens. But in order

¹ See *ante*, sect. 449.

that the statute may operate, there must be a seisin somewhere to feed the contingent uses as they arise. Great difficulty is experienced in discovering where that seisin is to be found, and in determining its character. For example, if an estate is limited to the use of A. for life, to the use of B.'s unborn son, to the use of C. in fee. The uses in A. and C. being vested, are immediately executed by the statute, while the use to the unborn son of B., being contingent, remains unaffected. A., under the statute, acquires a legal estate for life, and C. a vested remainder in fee. The statute, therefore, transfers to A. the seisin for life and to C. the seisin in fee in remainder. What is the nature of the seisin left to support the contingent use in B.'s unborn son, and where is it to be found when the use vests?

§ 480. **Importance of the question.** — The apparent necessity of locating this seisin and of determining its character arose from the consideration of two questions, viz.: 1. After the legal estate had been vested in A. for life and in C. in remainder, was not the entire seisin exhausted and drawn out of the feoffees or releasees to uses? 2. If any seisin did remain in the feoffees, could it not be destroyed and the contingent use defeated by a feoffment of the feoffees?

§ 481. **The solution of the question.** — A great deal of speculative discussion was indulged in by the earlier judges and writers, and a variety of opinions was the result. Some held that the entire seisin vested in the executed uses, subject to the future vesting of the contingent use; others maintained that sufficient seisin remained "*in nubibus, in mare, in terra, in custodia legis,*" ready to become united with the contingent use when the contingency happens; while, perhaps, the largest number sustained the view that a portion of the seisin, which they called a *scintilla juris* (a right to recover the seisin), remained in the feoffees to feed

the uses as they came into being. But, under this view of the case, it was necessary for the feoffees to enter in order to revive the seisin for the contingent use, and any feoffment by them would result in the destruction of the *scintilla juris*, and along with it the use depending upon it. But the modern writers upon uses have discarded all this abstruse and subtle reasoning, and support the more rational doctrine advocated by Mr. Sugden that “upon a conveyance to uses * * * immediately after the first estate is executed, the releasees to uses are divested of the whole estate, the estates limited previously to the contingent uses take effect, the contingent uses take effect as they arise, by force of and relation to the seisin of the releasees under the deed, and vested remainders over take effect according to the deed, subject to open and let in the contingent uses.”¹ The seisin receives, by force of the statute, the power or capacity of feeding all the uses as they arise, and of being transmitted from one to another as they vest in possession.² The maintenance of this view does away with the *scintilla juris*, and removes the necessity of a re-entry by the feoffee to regain the seisin for the support of the contingent use, even where there has been a disseisin of all the parties to the deed.³

§ 482. **Contingent uses.** — In the foregoing pages, the term *contingent use* has been used to signify any future or executory use whose vesting in title depends upon a contingency. But the term has been given a more restricted signification, meaning contingent uses which would be good

¹ 3 Prest. Conv. 400; 1 Sugden on Pow. 20-48; 4 Kent's Com. 238-247; Fearne Cont. Rem. 205; 2 Washb. on Real Prop. 611; Chudleigh's Case, 1 Rep. 120; Brent's Case, Dyer, 340; Tud. Ld. Cas. 260; Sand. on Uses. 110.

² 2 Washb. on Real Prop. 420.

³ 1 Sugden on Pow. 17-48; Fearne Cont. Rem. 293, 295, and Butler's note; 1 Cruise Dig. 282; 4 Kent's Com. 238-246; 2 Washb. on Real Prop. 611, 612.

contingent remainders if they had not been limited by way of uses.¹ It is a cardinal rule in the construction of all future estates, whether created by deed or will, that if they can take effect as remainders they will be construed to be such, even if they are limited as uses.² A contingent use is, therefore, treated in all essential particulars as a contingent remainder, and requires a particular estate of freehold to support it. If the use is not vested during the existence of the particular estate in the use, it fails in the same manner as if it had been limited as a common-law contingent remainder. And if, at the time of the conveyance, the future uses can take effect as remainders, they cannot take effect as future or executory uses when a change of circumstances has made them void as contingent remainders.³ And even where the future estate is void in its inception, if it is limited by way of a remainder, as where the vesting of the future use is made to depend upon the duration of a particular estate which cannot support a contingent remainder because it is less than a freehold, the future use will be void as a remainder, and cannot be construed as a springing or shifting use.⁴ But where the future use is not made to depend upon a preceding use, as where it is to vest at a time subsequent to the natural termination of the particular use, a limitation entirely repugnant to the law of remainders, it

¹ 1 Prest. Abstr. 105; 4 Kent's Com. 258; 2 Washb. on Real Prop. 608.

² Co. Lit. 217; Fearne Cont. Rem. 284; 1 Prest. Abstr. 108; 2 Washb. on Real Prop. 609.

³ Fearne Cont. Rem. 284, and Butler's note; 2 Cruise Dig. 261; *Adams v. Savage*, Salk. 679; *s. c.*, 2 Ld. Raym. 854; *Goodtitle v. Billington*, Dougl. 758; *The State v. Trask*, 6 Vt. 363; *Davies v. Speed*, Salk. 675. But see *Dingley v. Dingley*, 5 Mass. 535; *Carroll v. Hancock*, 3 Jones L. 471; *Nichols v. Denny*, 37 Miss. 59.

⁴ *Adams v. Savage*, 2 Ld. Raym. 854; *Williams on Real Prop.* 293; *Southcott v. Stowell*, 1 Modern, 238; *Cole v. Sewell*, 4 Dru. & Warr. 27; *Tud. Ld. Cas.* 263; 4 Kent's Com. 293; 2 Washb. on Real Prop. 612, 613. Mr. Washburn cites *Wils. Uses*, 9, in opposition to the text. 2 Washb. on Real Prop. 621.

will be held to be a springing or springing use, which will vest independently of the preceding estate.¹

§ 483. **Springing uses.** — A springing use is one to commence in the future, unsupported by the limitation of a preceding use, and which does not by its vesting defeat or cut short any prior limitation. Thus, a limitation to the use of B. and his heirs after the death of A. Until the death of A. the use results to the grantor, and at his (A.'s) death it is executed in B. and his heirs. A springing use may be either vested or contingent, according to the certainty or uncertainty of the event upon which it depends. The example given above is a vested springing use, as A. is sure to die, and the use takes effect whether B. dies before A. or survives him; but a limitation to the heirs of B. after the death of A. would be contingent, because of the uncertainty of B.'s dying before A.²

§ 484. **Shifting uses.** — A shifting or secondary use is one which is so limited, that its vesting will defeat the prior estate in the use, and is always contingent. The use upon the happening of the event shifts from the first taker to the second. It has been explained that at common law no estate could be limited after a fee or in derogation of the preceding estate.³ But there is no such restriction upon the limitation of uses. The use in fee may, upon the happening of successive events, be made to shift from one person to another without limit, provided the doctrine of perpetuity is not thereby violated. A shifting use is, therefore, one class of what are called conditional limitations. A condi-

¹ 2 Washb. on Real Prop. 621; *Gore v. Gore*, 2 P Wms. 28.

² 2 Cruise Dig. 263; 2 Washb. on Real Prop. 600-613; 4 Kent's Com. 298; *Egerton v. Brownlow*, 4 H. L. Cas. 206; *Mutton's Case*, Dyer, 274; *Jackson v. Dunsbaugh*, 1 Johns. Cas. 96; *Shapleigh v. Pilsbury*, 1 Me. 271; *Wyman v. Brown*, 50 Me. 156.

³ See *ante*, sects. 281, 396.

tional limitation can only be created under the Statute of Uses or the Statute of Wills. Under the former it is known as a shifting use, while under the latter it is called an executory devise.¹ When a future limitation is a conditional limitation, as distinguished from a contingent remainder, has been already discussed,² and will require no further elucidation.

§ 485. **Future uses in chattel interests.** — At common law it is impossible to create a remainder in a chattel interest. The lessee of a term of years could grant a part of the term to one and the rest to another, as, for example, out of a term of thirty years he could assign it to A. for ten years and to B. for twenty years, beginning at the close of A.'s term. But he could not give A. a life estate and B. a remainder in fee.³ This is possible, however, by way of a future use. Where, therefore, such a limitation of a term is made by way of a use it will not take effect as a remainder, but as a springing or shifting use, according to the terms of the limitation.⁴

§ 486. **Shifting and springing uses — How defeated.** — At common law the destruction of the particular estate by

¹ Fearne Cont. Rem. 385; 1 Spence Eq. Jur. 452; *Egerton v. Brownlow*, 4 H. L. Cas. 209; 2 Cruise Dig. 264; Co. Lit. 271 b, note 231, sect. 3; Tud. Ld. Cas. 363; *Winchelsea v. Wentworth*, 1 Vern. 402; 2 Washb. on Real Prop. 622-624. An example of a shifting use, would be, a limitation to A. and his heirs, and if B. should return from Rome, then over to C. and his heirs. The return of B. from Rome would determine the use in A., and execute the use in C. *Cogan v. Cogan*, Cro. Eliz. 360; *Carwardine v. Carwardine*, 1 Eden, 34; *Winchelsea v. Wentworth*, *supra*; *Doe v. Whittingham*, 4 Taunt. 22; *Buckworth v. Thirkell*, 3 B. & P. 655; *Batley v. Hopkins*, 6 R. I 445.

² See *ante*, sects. 281, 396, 415, 418.

³ 1 Cruise Dig. 235; Fearne Cont. Rem. 401; 4 Kent's Com. 270; *Wright v. Cartwright*, 1 Burr. 284.

⁴ 2 Bla. Com. 174; Fearne Cont. Rem. 401, Butler's note; *Lampet's Case*, 10 Rep. 46; *Wright v. Cartwright*, 1 Burr. 284; 2 Washb. on Real Prop. 624, 625,

feoffment or other act of the tenant will defeat any contingent remainder depending upon it.¹ And such is also the rule in regard to contingent uses.² But no act of the tenant of a preceding estate will effect the destruction of a springing or shifting use, which are in their nature independent of any prior estate which may be had in the use.³ It was formerly supposed that, if the tenant of the particular estate was disseised, in order that the contingent use might be executed, there must be an actual entry by the tenant and the actual seisin regained. But this doctrine has been repudiated by the best authorities, and it is now held that the contingent use would vest in title, whether the tenant is seised or has been disseised, and that the contingent *cestui que use* acquires the right of entry by the force of the Statute of Uses.⁴

¹ See *ante*, sect. 419.

² *Faber v. Police*, 10 S. C. 376. And see cases and references cited in note 3.

³ 2 Cruise Dig. 281; 4 Kent's Com. 241; Tud. Ld. Cas. 263; Archer's Case, 1 Rep. 67; Chudleigh's Case, 1 Rep. 120; 2 Washb. on Real Prop. 582, 583, 625, 626.

⁴ Fearn's Cont. Rem. 286, 290, 295; 1 Kent's Com. 242, 247; 1 Sugden on Pow. 17-48; 2 Cruise Dig. 282, 284; Tud. Ld. Cas. 260; Chudleigh's Case, 1 Rep. 120; *Wegg v. Villers*, 2 Rolle. Abr. 796. This last case is very celebrated, on account of the fact, that the suit was brought on the settlement by Lord Coke of his property upon his wife and daughter. The following is the account given of the case by Mr. Washburn, which is here appended, because a thorough appreciation of the fine points of the case involves an accurate knowledge of the principles enunciated in the preceding pages. "The circumstances under which it (the case of *Wegg v. Villers*) arose were these, as stated by the biographer of Lord Coke. The relations of Lord Coke with his wife, Lady Hatton, it is well known, were not of the most pleasant kind. Coke having fallen into disgrace with King James, while acting as Lord Chief Justice, sought to regain the favor of that weak and capricious monarch, and it was through the agency of Buckingham, who was, at the time, the King's favorite, that he sought to operate upon the King. Buckingham had a brother, Sir John Villers, and Coke a daughter, Frances, by Lady Hatton, and he proposed a match between them. The mother, angry at not having been consulted in the matter, carried her daughter off, and secreted her. Coke, discovering her place of concealment, went with his sons and seized her by force. Lady Hatton appealed to the Privy Council, and it became an

§ 487. *Incidents of springing and shifting uses.* — All such uses are capable of being disposed of in equity by assignment or by will, and they descend to the heirs of the

affair of state. It was at length adjusted, upon Lord Coke's paying £10,000 sterling, and entering into articles of settlement upon the marriage of his daughter, pursuant to articles and directions of the Lords of the Council. The adroitness with which this settlement was drawn, and the cunning manner in which he arranged its provisions, so as to defeat it or let it stand good as he might choose, will be perceived by recurring to its terms. and remembering and applying the idea advanced in Chudleigh's Case, that the uses, so far as contingent, must have an actual seisin in some one, answering to a feoffee's, to sustain them. In the first place, the conveyance was made by covenant to stand seised on his part, and the limitations derived their force and effect from the seisin in himself, for he covenanted to stand seised to the use of himself for life, remainder to the use of his wife for life, remainder to the use of his daughter for life, remainder to her first and other sons in tail, reversion to his own right heirs. This gave an estate to him for life in possession, a vested estate for life in remainder to his wife, and the same to his daughter for life in remainder, with contingent uses by way of remainder to unborn sons in tail, reserving to himself, after and above all these limitations, a reversion in fee. Lord Coke then made a deed of *grant* of this reversion to a third person without consideration, and in his deed recited the foregoing settlement. He then made a *feoffment* in fee of the lands thus settled, with livery of seising. As all the estates but the reversion were by way of use, it was the seisin that was in him as covenantor and reversioner which was to support them, and if this was destroyed, so far as these were contingent, they would be defeated. But as his grant of this reversion was to one having notice, it remained subject to the settlement, and the seisin of this grantee was that out of which these uses were to arise in the same way as from the seisin which Lord Coke had had before the grant. But as he was also in possession for life, the effect of his feoffment was not only to destroy his own seisin and estate, but to make a discontinuance of that of his grantee the reversioner, together with the estates of the wife and daughter. But it left a right of entry in the daughter. But as this discontinuance was a forfeiture of the father's life estate, and that of his wife during coverture, it gave a right of entry in the daughter as holder of the next vested estate, and a contingent right of entry to the wife, dependent on her surviving her husband. The former was sufficient to support the contingent use to the daughter's first son, provided there should be a seisin to serve such use, when it should arise. As it turned out, Lord Coke's wife survived him, and having, by the right of entry which she thereby acquired, entered upon the estate, reinstated the divested estates, including that of the grantee of the reversion, out of whose seisin the contingent uses were to arise, and the limitations took effect in their order. If, however, Lord Coke had made his feoffment before making the grant of the reversion, the effect would have been to have worked a dis-

cestui que use, and this, too, when the use is contingent, provided the contingency does not depend upon the uncertainty of the *cestui que use*. But they cannot be aliened by deed.¹ Where a springing use is vested, since the statute executes it *eo instanti*, it becomes a future legal estate with all the ordinary rights attaching thereto. Such a use can be disposed of in any manner of which a legal vested estate is capable. For the protection of the interests of these *cestuis que use* against any acts of waste of the prior tenant, the rules of the common law in respect thereto apply by analogy, and chancery, upon the application of the *cestui que use*, would restrain the commission of waste just as if his estate had been a contingent remainder.² Springing and shifting uses are, in their characteristics, essentially the same as executory devises, differing only in the manner of their creation; it would be a mere repetition, therefore, to discuss their incidents separately, beyond what has been said. This subject will be resumed under the head of executory devises.³

seisin and divested all of the then subsisting estates, including the estate or seisin out of which the contingent uses were to arise, and which was to serve them. For as there was no privity between his feoffee, his wife or daughter and his heirs, whose seisin alone could support their contingent uses, no entry by the wife or daughter could restore the estate and seisin of Lord Coke or his heirs, contrary to his own feoffment, since he himself could not have entered against such a feoffment. Now the cunning part of the arrangement, which was defeated by his dying while things were in the above state, was this. If he had seen fit to sustain the remainders, he would have suppressed the feoffment, and only have shown the grant of the reversion, to counteract the feoffment, if that should be set up by any one. Whereas if he had wished at any time to destroy the remainders, he would have suppressed the grant of the reversion, and left the feoffment to have its effect. As he left both these in force, it gave rise to the action above named, and an indefinite amount of refinement and ingenious discrimination upon a rule law too subtle to be apprehended by ordinary minds." 2 Washb. on Real Prop. 629-631.

¹ Fearne Cont. Rem. 366, and Butler's note; Jones v. Roe, 3 T. R. 88; Hobson v. Trevor, 2 P. Wms. 191; 2 Washb. on Real Prop. 626.

² Fearne Cont. Rem. 362, and Butler's note; Stansfield v. Habergam, 10 Ves. 275; 2 Washb. on Real Prop. 626.

³ See *post*, ch. XIV, sects. 540-543, 545-547.

SECTION IV.

TRUSTS.

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515. Alienation of trust estate.
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517. Compensation of trustee.

§ 493. What are trusts? — The Statute of Uses makes use of the words “use, confidence, and trust,” and recognizes no distinction between them, and before the statute there was, as has been shown,¹ no material difference between them, and such would have been the case in modern times if the statute had prevented the continued existence of equitable estates, in conformity with the design and intention of the legislators. But the statute was construed

¹ See *ante*, sect. 441.

to have no effect upon certain equitable interests,¹ which remained equitable and distinct from the legal estate after as well as before the statute. For the sake of convenience, and the purpose of distinguishing them from those uses and trusts which were executed by the statute, the term *trust* has since been exclusively applied to those equitable interests, which remain such, while the term *use* represents all such interests as are converted into legal estates, either *eo instanti* or subsequently, as in the case of contingent uses.²

§ 494. **Active and passive trusts.** — Where a special duty is to be performed by the trustee in respect to the estate, such as to collect the rents and profits, to sell the estate, etc.,³ the trust is called *active*. It is the duty which prevents the operation of the statute, for the trustee must have the legal estate in order to perform his duties.⁴ All other trusts are denominated *passive trusts*, because there is no duty imposed upon the trustee. He simply acts as a reservoir of the legal estate, because from the terms and character of the conveyance and limitation the statute cannot transfer the legal estate to the *cestui que use or trust*. Such would be a use upon a use, a use in chattel interests, and

¹ See *ante*, sect. 470.

² 1 Spence Eq. Jur. 491, 493, 494; 1 Prest. Est. 186-190; Tud. Ld. Cas. 268-276; 2 Bla. Com. 336; Doe v. Hamfrey, 6 A. & E. 206; Doe v. Biggs, 2 Taunt. 169; Doe v. Collier, 11 East, 377; 4 Kent's Com. 314; Ayer v. Ayer, 16 Pick. 327-330; Fisher v. Fields, 10 Johns. 505; Jones v. Bush, 4 Harr. 1; Horton v. Horton, 7 T. R. 653; 2 Pom. Eq. Jur., sects. 984-986.

³ 1 Cruise Dig. 384; Co. Lit. 290 b, 249, sect. 6; Tud. Ld. Cas. 270; 1 Prest. Abst. 143; Sherman v. Dodge, 28 Vt. 26; Aiken v. Smith, 1 Sneed, 304; Welles v. Castles, 3 Gray, 323; Ackland v. Lutley, 9 A. & E. 879; Robinson v. Grey, 6 East, 1; Hovell v. Barnes, Cro. Car. 382; Douglass v. Cruger, 80 N. Y. 15; Smith v. Harrington, 4 Allen, 566; Leonard v. Diamond, 31 Md. 563; Blake v. Anscombe, 1 B. & P., n. R., 25; Doe v. Field, 2 B. & Ad. 564; Culbertson's App., 76 Pa. St. 145; Brooks v. Marbury, 11 Wheat. 78; Gott v. Cooke, 7 Paige, 521; Doe v. Barthrop, 5 Taunt. 382; Doe v. Ewart, 7 A. & E. 636; Upham v. Varney, 15 N. H. 462; William's Appeals, 83 Pa. St. 377.

⁴ See authorities cited in preceding note.

uses to persons incapable of holding the legal estate — for example, married women.¹

§ 495. **Executed and executory trusts.** — Where the limitations are all definitely settled by the deed of creation, and there is nothing further to be done in order to determine the exact interest of the *cestui que use* and the duration of the trust, the trust is said to be *executed*. But where the terms of the trust-deed simply define how the settlement shall be made, and imposes that duty upon the trustee, the trust is called *executory*. All passive trusts and such active trusts, in which the duty of the trustee is confined to the ordinary administration of the property, are executed trusts, while active trusts, in which it is the duty of the trustee to convey to the person named, or to determine the shares which several shall take, and the like, are comprehended under the head of executory trusts. Executory trusts bear a close resemblance to powers when granted to trustees, to which more particular reference will be made in the treatment of that subject.²

¹ Doe v. Passingham, 6 B. & C. 305; Doe v. Collier, 11 East, 377; Price v. Sisson, 13 N. J. 173; Hayes v. Tabor, 41 N. H. 521; Kuhn v. Newman, 26 Pa. St. 227; Steacy v. Rice, 27 Pa. St. 75; Lines v. Darden, 5 Fla. 78; Horton v. Horton, 7 T. R. 653; Williman v. Holmes, 4 Rich. Eq. 495; Ware v. Richardson, 3 Md. 505; Moore v. Shultz, 13 Pa. St. 98; Welch v. Allen, 21 Wend. 147; Ramsay v. Marsh, 2 McCord, 252; Webster v. Cooper, 14 How. 488; 1 Prest. Abst. 140; Wagstaff v. Smith, 9 Ves. 520; Boyd v. England, 56 Ga. 598; Sutton v. Aiken, 62 Ga. 733; Bolles v. State Trust Co., 27 N. J. 308; Rogers Loc. Works v. Kelly, 19 Hun, 399; Weber v. Weber, 58 How. Pr. 255; Martin v. Funk, 75 N. Y. 134; Boone v. Bank, 84 N. Y. 83; Badgett v. Keating, 31 Ark. 400.

² It will be observed that the terms *executed* and *executory*, when applied to modern trusts, have a different significance from that which is given to them, in referring to the operation of the Statute of Uses upon uses. Fearne Cont. Rem. 55, 113, 139; 4 Kent's Com. 304, 305. Mr. Lewin defines these classes of trusts thus: "Trusts executed are where the limitations of the equitable interest are complete and final; in the trust executory, the limitations of the equitable interest are not intended to be complete or final, but merely to serve as minutes and instructions for perfecting the settlement at

§ 496. **Express trusts.** — All the trusts, which have been heretofore discussed, receive the further appellation of *express trusts*, because they are expressly created by some deed or other instrument of conveyance, and are to be distinguished from those trusts, which are explained in the succeeding paragraphs, and which arise by operation of law for the prevention of injury and the furtherance of justice. Express trusts are created by the express act of the party owning the property. And it may be stated here that the law will never imply a trust where one has been created expressly, even though the express trust is void for the want of some essential formality, unless the consideration is paid by the *cestui que trust* under such circumstances as to give rise to a resulting trust.¹

§ 497. **Implied, resulting, and constructive trusts.** — Trusts which arise by implication of law are subdivided by the books into *implied*, *resulting*, and *constructive* trusts. These names are purely arbitrary, and do not convey to the mind any idea of the distinguishing feature of the trusts

some future period. Lewin on Tr. 45; 2 Pom. Eq. Jur., sects. 1000, 1001; Saunders v. Edwards, 2 Jones Eq. 134; Evans v. King, 3 Id. 387; Porter v. Doby, 2 Rich. Eq. 49; Cushing v. Blake, 30 N. J. 689; 1 Eq. Ld. Cas. 1-36; Neves v. Scott, 9 How. 211; Tillinghast v. Coggeshall, 7 R. I. 393; Egerton v. Brownlow, 4 H. L. Cas. 210; Leonard v. Countess of Sussex, 2 Vern. 526; Wright v. Pearson, 1 Eden, 119; Austin v. Taylor, 1 Eden, 361; Boswell v. Dillon, Drury, 291; Mullany v. Mullany, 3 Green Ch. 16; Sackville-West v. Holmesdale, L. R. 4 H. L. Cas. 543; Carroll v. Renick, 7 Smed. & M. 798; Bowen v. Chase, 94 U. S. 812; Imlay v. Huntington, 20 Conn. 146; Riddle v. Cutter, 49 Iowa, 547; Tallman v. Wood, 26 Wend. 9; Berry v. Williamson, 11 B. Mon. 245; Horne v. Lyeth, 4 Har. & J. 431; Dennison v. Goehring, 7 Pa. St. 175; Wood v. Burnham, 6 Paige, 513; Shelley v. Shelley, L. R. 6 Eq. 540; Garnsey v. Mundy, 24 N. J. 243; Garner v. Garner, 1 Deems, 437.

¹ 1 Spence Eq. Jur. 496; 2 Washb. on Real Prop. 436, 437; 2 Pom. Eq. Jur., sects. 987, 1030; Dennison v. Goehring, 7 Pa. St. 175; Farrington v. Barr, 36 N. H. 86; Gibson v. Foote, 40 Miss. 792; Van der Volger v. Yates, 9 N. Y. 219; Graves v. Graves, 29 N. H. 129; Thomson v. Peake, 7 Rich. 353; Nightingale v. Hidden, 7 R. I. 121; Haggard v. Benson, 3 Tenn. Ch. 268; Ward v. Armstrong, 84 Ill. 151.

which they respectively represent. All trusts created by operation of law may be said to be *implied* or *constructive*, while the use of the word *resulting* serves, perhaps, to confound these trusts with resulting uses. But it is convenient to make use of this subdivision, and, for the want of better terms, these are employed to denote the three classes. Trusts created by operation of law cannot be executed by the Statute of Uses. They are not recognized by courts of law. They are the creations of equity, and are applied by the court of equity to all inequitable transactions where the ends of justice cannot be otherwise attained.¹

§ 498. **Implied trusts.** — Whenever the owner of land directs a certain disposition of it, which is to enure to the benefit of a third person without expressly creating a trust in his behalf, under the maxim that equity treats that as done which ought to be done, a trust will be implied in behalf of such beneficiary. Thus, if the testator directs his lands to be sold for the satisfaction of his debts, an implied trust is raised in favor of the creditors which will enable them to compel a performance of the trust by the executor. This implied trust was specially valuable in the days when real property was not liable for the debts of the owner.² Another well known application of the doctrine is the case of equitable conversion, so-called. When a contract for the sale of real property is made for a valuable consideration, and it is evidenced by an instrument in writing, equity

¹ 2 Washb. on Real Prop. 437; 2 Pom. Eq. Jur., sect. 1030; 1 Spence Eq. Jur. 496; 1 Prest. Est. 191; *Nightingale v. Hidden*, 7 R. I. 121; *Thompson v. Peake*, 7 Rich. 353, and cases cited in subsequent notes.

² 1 Spence Eq. Jur. 509; 2 Washb. on Real Prop. 438. This species of trust is, however, really an express trust, although it arises by construction, and is not strictly created by express limitation. 2 Pom. Eq. Jur., sect. 1010. See *Walker v. Whiting*, 23 Pick. 313; *Fay v. Taft*, 12 Cush. 448; *Baker v. Red*, 4 Dana, 158; *Lane v. Lane*, 8 Allen, 350; *Hoxie v. Hoxie*, 7 Paige, 187; *Blatch v. Wilder*, 1 Atk. 420; *Withers v. Yeadon*, 1 Rich. Eq. 324; *Watson v. Mayrant*, 1 Rich. Eq. 449.

will, by raising an implied trust in favor of the vendee, treat the vendor as his trustee in respect to the land to be conveyed, and the trust will be enforced by a decree for specific performance.¹

§ 499. **Resulting trusts.**—These trusts arise in two principal cases: *First*, where only a part of the trust is declared, and the rest remains undisposed of. In such a case there is a resulting trust in favor of the grantor. Resulting trusts of this class are such as result to the grantor, but which, on account of the terms of the conveyance, cannot be executed as uses. Where the statute can operate, the equitable interest is a resulting use, and becomes a legal estate under the statute. Resulting interests in chattels, held in trust, are *resulting trusts*, and *not* resulting uses.² Thus, in the devise of an income to one, when he becomes of age, there is a resulting trust in the immediate income to the devisor's heirs; or where property is directed to be

¹ 1 Spence Eq. Jur. 509; *Jackson v. Morse*, 16 Johns. 197; *Connor v. Lewis*, 16 Me. 268; *Coman v. Lakey*, 80 N. Y. 345; *Pelton v. Westchester Fire Ins. Co.*, 77 N. Y. 605; *Musham v. Musham*, 87 Ill. 80; *Felch v. Hooper*, 119 Mass. 52; *Bowie v. Berry*, 3 Md. Ch. 359; *Knox v. Gye*, L. R. 5 H. L. Cas. 656. But there must, of course, be a written agreement of sale to satisfy the Statute of Frauds, or such a part performance as will take the case out of the statute. *Harris v. Barnett*, 3 Gratt. 339; *Hill v. Meyers*, 43 Pa. St. 170; *Phillips v. Thompson*, 1 Johns. Ch. 131; *Ryan v. Dox*, 34 N. Y. 312; 3 Washb. on Real Prop. 215. An implied trust will also arise in favor of partnership-creditors in respect to the partnership property, when the insolvency of a firm or of its members creates a contention of interests between the partnership creditors and the creditors of the individual partners. *Hastings v. Drew*, 76 N. Y. 9; *Bartlett v. Drew*, 57 *Id.* 587; *Murray v. Murray*, 5 Johns. Ch. 60; *West v. Skip*, 1 Ves. sr. 239; *Campbell v. Mullett*, 2 Sw. 551; *Knox v. Gye*, L. R. 5 H. L. Cas. 656.

² They are called resulting trusts, because they cannot be executed by the statute. In every other respect they are like resulting uses, and will arise only under such circumstances as would cause a resulting use in the freehold estate. A resulting trust in a chattel only arises when there is no consideration to the grantor and no consideration expressed in the grant. For the particular cases in which there will be a resulting use, and, if it be a chattel interest, a resulting trust, see *ante*, sect. 443.

sold for certain purposes, and the proceeds are more than sufficient for the purposes of the trust, there is a resulting trust in the surplus to the heirs of the devisor.¹ There is also a resulting trust in favor of the grantor and his heirs where the purposes of the express trust have failed, from whatever cause the failure may arise. Thus, if the trust be to appoint the estate in favor of a certain person, and the trustee fails to appoint, or the person dies before appointment, the trust will result to the grantor.² The trustee will in none of these cases enjoy the trust, even though a nominal consideration be mentioned in the deed. Nothing will prevent the resulting of the trust to the grantor but the payment of an adequate, or at least substantial, consideration.³ The nominal consideration will prevent the resulting

¹ *Lloyd v. Lloyd*, L. R. 7 Eq. 458; *Longley v. Longley*, L. R. 13 Eq. 133; *Cottinger v. Fletcher*, 2 Atk. 155; *Lloyd v. Spillet*, 2 *Id.* 149; *Elcock v. Mapp*, 3 H. L. Cas. 492; *Davidson v. Foley*, 2 Bro. Ch. 203; *Halford v. Stains*, 16 Sim. 488; *Watson v. Hayes*, 5 My. & Cr. 125; *Sewell v. Denny*, 10 Beav. 315; *Read v. Stedman*, 26 *Id.* 495; *Esterbrooks v. Tillinghast*, 5 Gray, 17; *Hogan v. Jaques*, 19 N. J. Eq. 123; *Loring v. Elliot*, 16 Gray, 568; *Hogan v. Stayhorn*, 65 N. C. 279; *McCallister v. Willey*, 52 Ind. 382; *Trapnall v. Brown*, 19 Ark. 39; *Pouce v. McEloy*, 47 Cal. 154; *Kennedy v. Nunan*, 52 Cal. 326.

² 1 Cruise Dig. 375, 394; *Ashhurst v. Givens*, 5 Watts & S. 327; *Sturtevant v. Jaques*, 14 Allen, 523; *Shaw v. Spencer*, 100 Mass. 332; *Nichols v. Allen*, 130 Mass. 211; *Olliffe v. Wells*, 130 Mass. 221; *Dashiell v. Att'y-Gen.*, 6 Har. & J. 1; *Power v. Cassidy*, 79 N. Y. 602; *Lemmond v. Peoples*, 6 Ired. Eq. 137; *Hawley v. James*, 5 Paige, 318; *Straat v. Uhrig*, 56 Mo. 482; *Bennett v. Hudson*, 33 Ark. 762; *Russ v. Mebius*, 16 Cal. 350; *Ackroyd v. Smithson*, 1 Bro. Ch. 503; *Goodere v. Lloyd*, 3 Sim. 538; *Taylor v. Haygarth*, 14 Sim. 8; *Williams v. Coade*, 10 Ves. 500; *Davenport v. Coltman*, 12 Sim. 588; *James v. Allen*, 3 Meriv. 17; *Stubbs v. Sargon*, 3 My. & Cr. 507; *Kendall v. Granger*, 5 Beav. 300; *Williams v. Kershaw*, 5 Cl. & Fin. 111; *Richards v. Delbridge*, L. R. 18 Eq. 11; *Carrick v. Errington*, 2 P. Wms. 361; *Coard v. Holderness*, 20 Beav. 147; *Pawson v. Brown*, L. R. 13 Ch. 202; *Pilkington v. Boughey*, 12 Sim. 114; *Dawson v. Clark*, 18 Ves. 247; *Att'y-Gen. v. Windsor*, 8 H. L. Cas. 369; *Ashton v. Wood*, L. R. 6 Eq. 419; *Stansfield v. Habergham*, 10 Ves. 273; *Wood v. Cox*, 2 My. & Cr. 507.

³ 1 Spence Eq. Jur. 467; *Orton v. Knab*, 3 Wis. 576; 2 Washb. on Real Prop. 438; 2 Pom. Eq. Jur., sect. 1033.

of such a use as will be executed by the statute, but will have no effect upon the resulting trust.

§ 500. **Same — Payment of consideration.** — The second class of resulting trusts includes those cases, in which the estate is purchased in the name of one person and the consideration is paid by another. But two circumstances must concur in order that a trust may result to the one paying the consideration: *First*, the execution of the deed in the name of the one person must be the result of some fraud, accident, or mistake. Or, if it is done with the knowledge and consent of the person paying the consideration, his intention that he should have the beneficial interest in the estate must be clearly established.¹ *Secondly*, the

¹ *Dyer v. Dyer*, 2 Cox, 92; 1 Eq. Ld. Cas. 314; *Lloyd v. Read*, 1 P. Wms. 607; *Withers v. Withers*, Ambl. 151; *Rider v. Kidder*, 10 Ves. 360; *Medmer v. Medmer*, 26 N. J. Eq. 269; *Smith v. Patton*, 12 W. Va. 541; *Billings v. Clinton*, 6 S. C. 90; *Lee v. Browder*, 51 Ala. 288; *Thomas v. Standiford*, 49 Md. 181; *Tilford v. Torrey*, 53 Ala. 120; *Cunningham v. Bell*, 83 N. C. 328; *Kelley v. Jenness*, 50 Me. 455; *Hopkinson v. Dumas*, 42 N. H. 306; *Kendall v. Mann*, 11 Allen, 15; *Nixon's App.*, 63 Pa. St. 279; *Clark v. Clark*, 43 Vt. 685; *Boyd v. McLean*, 1 Johns. Ch. 582; *Brooks v. Shelton*, 54 Miss. 353; *Hampson v. Fall*, 64 Ind. 382; *Duval v. Marshall*, 30 Ark. 230; *Dean v. Dean*, 6 Conn. 285; *McGovern v. Knox*, 21 Ohio St. 547; *Latham v. Henderson*, 47 Ill. 185; *Mathis v. Stufflebeam*, 94 Ill. 481; *Moss v. Moss*, 95 Ill. 449; *Johnson v. Quarles*, 47 Mo. 423; *McLenan v. Sullivan*, 13 Iowa, 521; *Boskowitz v. Davis*, 12 Nev. 446; *Logan v. Walker*, 1 Wis. 527; *Case v. Coddington*, 38 Cal. 191; *Roberts v. Ware*, 40 Cal. 634; *Baumgartner v. Guessfeld*, 38 Mo. 36; *Jackson v. Cleveland*, 15 Mich. 102; *Smith v. Strahan*, 16 Texas, 314; *Sayre v. Townsend*, 15 Wend. 647. The payment of the consideration and the intention of the parties in respect to the beneficial interest may be established by parol evidence, even against the express recitals of the deed. But the evidence must be clear. It would seem that this would be a clear violation of the Statute of Frauds, where the deed was taken in the name of another with the understanding that the one paying the consideration shall be the beneficial or equitable owner. For it is difficult to see in what way such a trust differs from an express trust, which is required to be manifested by some writing. But the decisions have held that it was not necessary for it to be in writing, and such must be taken to be the law. See *Willis v. Willis*, 2 Atk. 71; *Gascoigne v. Thwing*, 1 Vern. 366; *Heard v. Pilley*, L. R. 4 Ch. 548; *Baker v. Vining*, 30 Me. 121; *Boyd v. McLean*, 1 Johns. Ch. 582; *Hennesy v. Walsh*, 55 N. H.

consideration must be paid by the person claiming the resulting trust at the time of the transaction of sale or conveyance. Any subsequent payment of the consideration by such person, even though he has been compelled to do so as surety of the grantee, will not raise a trust.¹ The ab-

515; *Parker v. Snyder*, 31 N. J. Eq. 164; *Livermore v. Aldrich*, 5 Cush. 431; *Jackson v. Feller*, 2 Wend. 465; *Stumpfer v. Roberts*, 18 Pa. St. 283; *Whitmore v. Learned*, 70 Me. 276; *Thomas v. Standiford*, 49 Md. 181; *Miller v. Blöse's Ex'or*, 30 Gratt. 744; *Hyden v. Hyden*, 6 Baxt. 406; *Coates v. Woodworth*, 13 Ill. 654; *Lee v. Browder*, 51 Ala. 288; *Agricultural Ass'n v. Brewster*, 51 Texas, 257; *Byers v. Wackman*, 16 Ohio St. 440; *Bryant v. Hendricks*, 5 Iowa, 256; *Murphy v. Peabody*, 63 Ga. 522; *Billings v. Clinton*, 6 S. C. 90; *Drum v. Simpson*, 6 Binn. 478; *Smith v. Patton*, 12 W. Va. 541; *McCreary v. Casey*, 50 Cal. 349; *Ward v. Armstrong*, 84 Ill. 151. In like manner the presumption of a trust arising from the payment of the consideration may be rebutted by parol evidence, showing that the one paying the consideration intended that the grantee in the deed should have the benefit of the purchase as a gift, provided such parol evidence does not contradict the terms of the deed. *Lane v. Dighton*, Ambl. 409; *Benbow v. Townsend*, 1 My. & K. 506; *Hopkinson v. Dumas*, 42 N. H. 303; *Edwards v. Edwards*, 39 Pa. St. 378; *Carter v. Montgomery*, 2 Tenn. Ch. 216; *White v. Carpenter*, 2 Paige, 238; *Perkins v. Nichols*, 11 Allen, 545; *Adams v. Greerard*, 26 Ga. 651; *Shepherd v. White*, 11 Texas, 346. Resulting trusts are now regulated by statute in New York, Michigan, Indiana, Kentucky, Minnesota, Wisconsin and Kansas. They all substantially abolish such resulting trusts as arise in a conveyance to one person in favor of another who has paid the consideration, except in favor of the judgment-creditors of the latter. They may enforce the trust in their behalf if they were creditors at the time of the conveyance. 2 R. S. N. Y. (1875) 1105, sects. 51, 52, 53; 2 Comp. Laws Mich. (1871) 1331, sects. 7, 8, 9; 1 R. S. Wis. 1129, sects. 7, 8, 9; Comp. Laws Kan., p. 989, sects. 6, 7, 8. But the statutes expressly except those cases where the deed has been taken in the name of another, through some accident, fraud or mistake. For cases in which these statutes have been under consideration see *Reitz v. Reitz*, 80 N. Y. 538; *Siemon v. Schurck*, 29 N. Y. 598; *Weare v. Linnell*, 29 Mich. 224; *Munch v. Shabel*, 37 Mich. 166; *Derry v. Derry*, 74 Ind. 560; *Hon v. Hon*, 70 Ind. 135; *Catherwood*, 65 Ind. 576; *Baker v. Baker*, 22 Minn. 262; *Rogers v. McCauley*, *Id.* 384; *Durfee v. Pavitt*, 14 Minn. 422; *Graves v. Graves*, 3 Metc. 167; *Kennedy v. Taylor*, 20 Kan. 558; *Mitchell v. Skinner*, 17 Kan. 563; *Underwood v. Sutcliffe*, 77 N. Y. 51; *Traphagen v. Burt*, 67 N. Y. 30.

¹ *Howell v. Howell*, 15 N. J. Eq. 78; *Brooks v. Fowler*, 14 N. H. 248; *Buck v. Swazey*, 35 Me. 41; *Kelly v. Johnson*, 28 Mo. 249; *Oliver v. Dougherty*, 3 Iowa, 371; *Sullivan v. McLenans*, 2 Iowa, 442; *Baumgartner v. Guessfeld*, 38 Mo. 86; *Brawner v. Staup*, 21 Md. 337; *Francetown v. Deering*, 41 N. H. 443; *Barnett v. Dougherty*, 32 Pa. St. 371; *Gee v. Gee*, 32 Miss. 190; *Kendall*

sence of either of these circumstances will prevent the trust resulting from the payment of the consideration.¹ These resulting trusts rest upon the presumption that the person beneficially entitled has been deprived of his interest against his will. But where the relation between the parties is so close as to permit of the counter-presumption that the one paying the consideration intended it as a gift to the one in whose name the deed is taken, as where the parties are husband and wife, parent and child, and the like, there will be no resulting trust.² But this is only a presumption of law

v. Mann, 11 Allen, 17; *Perkins v. Nichols*, 11 Allen, 546; *Kellum v. Smith*, 33 *Id.* 164; *Alexander v. Tams*, 13 Ill. 221; *Perry v. McHenry*, 33 *Id.* 227; *Davis v. Wetherell*, 11 Allen, 20; *Whiting v. Gould*, 2 Wis. 552; *Hopkinson v. Dumas*, 42 N. H. 301; *Pegnes v. Pegnes*, 5 Ired. Eq. 418. So also will a trust result to one who pays a part of the purchase-money with the intention that he shall have an interest in the land. But in order that there may be a resulting trust in his favor, the exact amount which he advances must be clearly established. Any doubt or uncertainty in that respect will prevent the trust from resulting. *Purdy v. Purdy*, 3 Md. Ch. 547; *Shoemaker v. Smith*, 11 Humph. 81; *Miller v. Birdsong*, 7 Baxt. 531; *Smith v. Patton*, 12 W. Va. 541; *Pierce v. Pierce*, 7 B. Mon. 438; *Franklin v. McEntire*, 23 Ill. 91; *Smith v. Smith*, 85 Ill. 189; *Cramer v. Hoose*, 93 Ill. 503; *Shea v. Tucker*, 56 Ala. 450; *Hidden v. Jordan*, 21 Cal. 92; *Bayles v. Baxter*, 22 Cal. 578; *Case v. Coddington*, 38 Cal. 191; *McCreary v. Casey*, 50 Cal. 349; *Wray v. Steele*, 2 V. & B. 388; *Barron v. Barron*, 24 Vt. 375; *McGowan v. McGowan*, 14 Gray, 119; *Harper v. Phelps*, 21 Com. 257; *Williams v. Hollingsworth*, 1 Strobh. Eq. 103; *Botsford v. Burr*, 2 Johns. Ch. 405; *Smith v. Strahan*, 16 Texas, 314; *Sayre v. Townsend*, 15 Wend. 647; *Wallace v. Duffield*, 2 Serg. & R. 521.

¹ *McCue v. Gallagher*, 23 Cal. 53; *Gee v. Gee*, 32 Miss. 190; *Dow v. Jewell*, 21 N. H. 470; *Gibson v. Foote*, 40 Miss. 792; *Hunt v. Moore*, 6 Cush. 1; *Ramsdell v. Emory*, 46 Me. 311; *Jackman v. Ringland*, 4 W. & S. 149; *Botsford v. Burr*, 2 Johns. Ch. 405; *Stephenson v. Thompson*, 13 Ill. 186; *McCullough v. Ford*, 96 Ill. 439; *House v. House*, 57 Ala. 292; *Kennedy v. Price*, 57 Miss. 771; *Hennesy v. Walsh*, 55 N. H. 515, and cases cited in the preceding notes.

² It is presumed to be a gift, because the purchasers in the cases supposed, husband and father, are under a moral or *quasi* legal obligation to maintain the persons in whose names the deeds are taken, viz., wife and child. 1 Cruise Dig. 394; 1 Spence Eq. Jur. 511; *Kingdon v. Bridges*, 2 Vern. 67; *Dyer v. Dyer*, 2 Cox, 92; *Rider v. Kidder*, 10 Ves. 360; *Finch v. Finch*, 15 Ves. 43; *Williams v. Williams*, 32 Beav. 370; *Sayre v. Hughes*, L. R. 5 Eq. 376; *Marshall v. Crutwell*, L. R. 20 Eq. 328; *Livingston v. Livingston*, 2 Johns. Ch.

in rebuttal to the presumption of a trust raised by the payment of the consideration. If it is shown that the deed was taken in the name of the wife or child through a mistake of the scrivener, or the fraud of some one, or with the intention that the husband or father should have the equitable interest, the trust will result as in any other case.¹

537; *Farnell v. Lloyd*, 69 Pa. St. 239; *Lorentz v. Lorentz*, 14 W. Va. 809; *Douglass v. Brice*, 4 Rich. Eq. 322; *Stevens v. Stevens*, 70 Me. 92; *Welton v. Divine*, 20 Barb. 9; *Lochenour v. Lochenour*, 61 Ind. 595; *Smith v. Strahan*, 16 Texas, 314; *Sunderland v. Sunderland*, 19 Iowa, 338; *Baker v. Baker*, 22 Minn. 262. And the same presumption prevails wherever one purchases property in the name of another, while the former stands *in loco parentis* (between mother and child). In *re De Visme*, 2 De G., J. & S. 17; *Batstone v. Salter*, L. R. 19 Eq. 250. But see *Murphy v. Nathans*, 46 Pa. St. 508; *Shaw v. Read*, 47 Pa. St. 103; *Flynt v. Hubbard*, 57 Miss. 471 (between grandfather and grandchild); Co. Lit. 290 b, note 249, sect. 8; *Ebrand v. Dancer*, 2 Chan. Cas. 26. See generally *Beckford v. Beckford*, Lofft. 490; *Loyd v. Read*, 1 P. Wms. 607; *Tucker v. Burrow*, 2 Hem. & M. 515; *Sayre v. Hughes*, L. R. 5 Eq. 376; *Currant v. Jags*, 1 Coll. 261; *Smith v. Patton*, 12 W. Va. 541; *Higdon v. Higdon*, 57 Miss. 264. On the other hand there is no presumption of a gift where the deed is taken in the name of the husband or father, and the purchase-money is paid by the wife or child. *Howell v. Howell*, 15 N. J. Eq. 77; *Beck's Ex'ors v. Graybill*, 28 Pa. St. 66; *Thomas v. Standiford*, 49 Md. 181; *Loften v. Witboard*, 92 Ill. 461; *Moss v. Moss*, 95 Ill. 449; *Catherwood v. Watson*, 65 Ind. 575; *Squire v. Harder*, 1 Paige, 494; *Russ v. Mebius*, 16 Cal. 350; *Cunningham v. Bell*, 83 N. C. 328; *Tilford v. Torrey*, 53 Ala. 120; *Leman v. Whitley*, 4 Russ. 423.

¹ *Wallace v. Bowens*, 28 Vt. 638; *Sawyer's Appeal*, 16 N. H. 414; *Dickinson v. Davis*, 43 N. H. 647; *Jackson v. Matadurf*, 11 Johns. 91; *Livingston v. Livingston*, 2 Johns. Ch. 539; *Stevens v. Stevens*, 70 Me. 92; *Baker v. Vining*, 30 Me. 121; *Rankin v. Harper*, 23 Mo. 579; *Eddy v. Baldwin*, 23 Mo. 588; *Springer v. Berry*, 47 Me. 338; *Shepherd v. White*, 10 Texas, 72; *Guthrie v. Gardner*, 19 Wend. 414; *Smith v. Strahan*, 16 Texas, 314; *Lampleigh v. Lampleigh*, 1 P. Wms. 111; *Sidmouth v. Sidmouth*, 2 Beav. 447; *Williams v. Williams*, 32 Beav. 370; *Kilpin v. Kilpin*, 1 My. & R. 520; *Devoy v. Devoy*, 3 Sm. & Giff. 403. It has been held that there can be no resulting trust in favor of a husband in property in the name of the wife, because the wife cannot be trustee for the husband. 1 Cruise Dig. 402; *Kingdon v. Bridges*, 2 Vern. 67; *Alexander v. Warrance*, 17 Mo. 228; *Jencks v. Alexander*, 11 Paige Ch. 619. This technical rule is not presumed to prevail in this country as an obstacle in the way of raising a resulting trust, and certainly not in those States where the wife is treated, in respect to her property, as a *feme sole*. See cases cited, *supra*.

§ 501. **Constructive trusts.** — Constructive trusts arise where the trustee or any other person holding a fiduciary position, by fraud, actual or constructive, makes an illegal disposition of the trust property to the injury of the *cestui que trust* or beneficiary. The latter can, at his election, follow such trust property into whosoever hands it may come with notice of the trust.¹ And it matters not whether the original holding of such property was legal or illegal; if, afterwards, it becomes illegal, the same rule will apply.² The most common instances of constructive trusts are purchases by the trustee of trust property at his own sale, or an illegal conveyance by him to one having notice of the trust, or paying no valuable consideration. It is a general rule of law that a trustee cannot purchase at his own sale, and if he does he cannot acquire an absolute title. It is voidable at the election of the *cestui que trust*. Until an avoidance or ratification by him there is a constructive trust raised in his favor.³ But this rule does not prevent him

¹ 2 Washb. on Real Prop. 447; 1 Spence Eq. Jur. 511; 2 Pom. Eq. Jur. 1044; Perry on Tr., sect. 166.

² Thus, if a mortgage is given jointly to two, and one dies, the survivor would hold the mortgage as trustee for himself and the heirs and personal representatives of the deceased. *Buck v. Swazey*, 35 Me. 41; *Randall v. Phillips*, 3 Mason, 378; *Caines v. Grant*, 5 Binn. 119.

³ *Jennison v. Hapgood*, 7 Pick. 8; *Gardner v. Ogden*, 22 N. Y. 327; *Collins v. Smith*, 1 Head, 251; *Swinburne v. Swinburne*, 28 N. Y. 568; *Bellamy v. Bellamy*, 6 Fla. 62; *McNish v. Pope*, 8 Rich. Eq. 112; *Brown v. Lynch*, 1 Paige, 167; *Hubbell v. Medbury*, 53 N. Y. 98; *Hoffman, etc., Co. v. Cumberland, etc., Co.*, 16 Md. 507; *Jamison v. Glasscock*, 29 Mo. 191; *Fairman v. Bavin*, 29 Ill. 76; *Charles v. Dubose*, 29 Ala. 367; *Huff v. Earl*, 3 Ind. 306; *Herr's Estate*, 1 Grant Cas. 272; *Baldwin v. Allison*, 4 Minn. 25; *Gaerrens v. Bailleno*, 48 Cal. 118; *Scott v. Umbarger*, 41 Cal. 410; *Boyd v. Blankman*, 29 Cal. 20; *Mitchell v. Berry*, 1 Metc. (Ky.) 602; *McCrary v. Foster*, 1 Iowa, 276; *Grumley v. Grumley*, 44 Mo. 444; *Cookson v. Richardson*, 69 Ill. 137; *Newton v. Taylor*, 39 Ohio St. 399; *Rea v. Copelin*, 47 Mo. 76; *Broyles v. Nowlin*, 59 Tenn. 191; *Reickhoff v. Brecht*, 51 Iowa, 633; *Pindall v. Trevor*, 30 Ark. 249; *Blauvelt v. Ackerman*, 20 N. J. Eq. 141; *Barnett v. Bamber*, 81 Pa. St. 247; *Webster v. King*, 33 Cal. 348; *Tracy v. Colby*, 55 Cal. 67; *Tracy v. Craig*, 55 Cal. 359; *Davis v. Rock Creek*, 55 Cal. 359; *Giddings v. Eastman*,

from purchasing the trust property with the consent of the *cestui que trust*, provided the latter is of age. But such transactions are closely watched, and if the consideration paid therefor be not adequate, the courts are greatly disposed to set aside the sale.¹ In the same manner if the trustee attempts to make an illegal disposition of the land, his grantee will take it bound with a constructive trust in favor of the *cestui que trust*, unless he has had no actual or constructive notice of the trust, and has paid a valuable consideration.² These are only the more common instances

5 Paige, 561; Reitz v. Reitz, 80 N. Y. 538; Smith v. Stephenson, 45 Iowa, 645; Mathews v. Light, 32 Me. 305; Manning v. Hayden, 5 Sawyer, 360; Jones v. Dexter, 130 Mass. 380; Whitwell v. Warner, 26 Vt. 425; Blount v. Robeson, 3 Jones Eq. 73; Hastings v. Drew, 76 N. Y. 9; Bennett v. Austin, 81 N. Y. 308; Smith v. Frost, 70 N. Y. 605; Treadwell v. McKeon, 7 Baxt. 201; Fox v. Mackreth, 2 Bro. Ch. 400; Church v. Sterling, 16 Conn. 388; 1 Eq. Ld. Cas. 188, *et seq.*; Powell v. Glover, 3 P. Wms. 252; Kimber v. Barber, L. R. 8 Ch. 56; Heath v. Crealock, L. R. 18 Eq. 215; In re Hallett's Estate, L. R. 13 Ch. 696; Wedderburn v. Wedderburn, 4 My. & Cr. 41; Willett v. Blanford, 1 Harr. 253; Fawcett v. Whitehouse, 1 Russ. & M. 132; Great Luxembourg Ry. Co. v. Magnay, 25 Beav. 586; Barnes v. Addy, L. R. 9 Ch. 244.

¹ Downes v. Grazebrook, 3 Meriv. 208; Ex parte Lacey, 6 Ves. 625; Morse v. Royal, 12 Ves. 355; Denton v. Donner, 23 Beav. 285; Coles v. Trecsthyck, 9 Ves. 234; Spencer v. Newbold's Appeal, 80 Pa. St. 317; Bayan v. Duncan, 11 Geo. 67; Sallee v. Chandler, 26 Mo. 124; Richardson v. Spencer, 18 B. Mon. 450; Kennedy v. Kennedy, 2 Ala. 571; Villines v. Norfleet, 2 Dev. Eq. 167; Mitchell v. Berry, 1 Metc. (Ky.) 602; Marshall v. Stephens, 2 Humph. 159. See also, in respect to purchases by agent of principal's property. Fisher's Appeal, 34 Pa. St. 29; Marshall v. Joy, 17 Vt. 546; Moore v. Mandlebaum, 8 Mich. 433; Burrell v. Bull, 3 Sandf. Ch. 15; Young v. Hughes, 32 N. J. Eq. 372; Farnam v. Brooks, 9 Pick. 212; Walker v. Carrington, 74 Ill. 446; Kuntz v. Fisher, 8 Kan. 90; Mahon v. McGraw, 26 Wis. 614.

² Thompson v. Wheatley, 5 Smed. & M. 499; Fillman v. Divers, 31 Pa. St. 42; Hopkinson v. Dumas, 42 N. H. 304; Shryock v. Waggoner, 28 Pa. St. 430; Church v. Church, 25 Pa. St. 278; Boone v. Chiles, 10 Pet. 177; Lyford v. Thurston, 16 N. H. 408; Stewart v. Chadwick, 8 Iowa, 463; Paul v. Fulton, 25 Mo. 156; McVey v. Quality, 97 Ill. 93; Dey v. Dey, 26 N. J. Eq. 182; Palmer v. Oakley, 2 Dougl. (Mich.) 433; Veile v. Blodgett, 49 Vt. 270; Murray v. Ballou, 1 Johns. Ch. 566; Phelps v. Jackson, 31 Ark. 272; Planter's Bk. v. Prater, 64 Ga. 609; Dotterer v. Pike, 60 Ga. 29; Musham v. Musham, 67 Ill. 80; Swinburne v. Swinburne, 28 N. Y. 568; Newton v. Porter, 69 N.

of constructive trusts. But there are many others, and it may be stated as the invariable rule that where there has been a fraud committed in the disposition or acquisition of property, equity will raise a constructive trust in favor of the person defrauded, unless it will interfere with and affect the interests of innocent third persons. Thus, if one embezzles money intrusted to his care and invests it in real estate, the person to whom the money belongs will have a constructive trust in such land as against every one except an innocent subsequent purchaser.¹ And the invalidity of a voluntary conveyance as against the creditors of the grantor may be ascribed to the application of the same principle. The creditors have a constructive trust in the property of

Y. 133; *Siemon v. Schurck*, 29 N. Y. 598; *Russell v. Clark's Ex'ors*, 7 Cranch, 69; *Mercier v. Hemme*, 50 Cal. 427; *Sharpe v. Goodwin*, 51 Cal. 219; *Boyd v. Brincken*, 55 Cal. 427; *Griffin v. Blanchard*, 17 Cal. 70; *Winona, etc., R. R. v. St. Paul, etc., R. R.*, 26 Minn. 179.

¹ *Foote v. Colvin*, 3 Johns. 216; *Murdock v. Hughes*, 7 Smed. & M. 219; *Prevost v. Gratz*, 1 Pet. C. Ct. 364; *Philips v. Crammond*, 2 Wash. C. Ct. 441; *Johnson v. Dougherty*, 18 N. J. Eq. 406; *Robb's Appeal*, 41 Pa. St. 45; *Smith v. Burnham*, 3 Sumn. 435; *Thomas v. Walker*, 6 Humph. 92; *Turner v. Pettigrew*, 6 Humph. 438; *Wallace v. Duffield*, 2 Serg. & R. 521; *Williams v. Turner*, 7 Ga. 348; *Pratt v. Oliver*, 2 McLean, 313; 3 How. (U. S.) 333; *Duncan v. Jandon*, 15 Wall. 165; *Hubbard v. Burrell*, 41 Wis. 365; *Pugh v. Pugh*, 9 Ind. 132; *Barker v. Barker*, 14 Wis. 146; *Barrett v. Bamber*, 81 Pa. St. 247; *McLarren v. Brewer*, 51 Me. 402; *Church v. Sterling*, 16 Conn. 388; *Homer v. Homer*, 107 Mass. 82; *Jones v. Dexter*, 130 Mass. 380; *Shaw v. Spencer*, 100 Mass. 382; *Mathews v. Heyward*, 2 S. C. 239; *Watson v. Thompson*, 12 R. I. 466; *Schlaefel v. Carson*, 52 Barb. 510; *Ferris v. Van Vechten*, 73 N. Y. 113; *Bancroft v. Consen*, 13 Allen, 50; *Shelton v. Lewis*, 27 Ark. 190; *Mich., etc., R. R. v. Mellen*, 44 Mich. 321; *Derry v. Derry*, 74 Ind. 560; *Reickhoff v. Brecht*, 51 Iowa, 633; *White v. Drew*, 42 Mo. 561; *Tilford v. Torrey*, 53 Ala. 120; *Coles v. Allen*, 64 Ala. 98; *Moss v. Moss*, 95 Ill. 449; *Winkfield v. Brinkman*, 21 Kan. 682; *Roy v. McPherson*, 11 Neb. 197; *Thomas v. Standiford*, 49 Md. 181; *Tracy v. Kelley*, 52 Ind. 535; *Dodge v. Cole*, 97 Ill. 338; *Settembre v. Putnam*, 30 Cal. 490; *Jenkins v. Frink*, 30 Cal. 586; *Flanders v. Thompson*, 3 Woods C. Ct. 9; *Keech v. Sandford*, Sel. Cas. Ch. 61; 1 Eq. Ld. Cas. 48; *Deg v. Deg*, 2 P. Wms. 412; *Lench v. Lench*, 10 Ves. 511; *Lane v. Dighton*, Ambl. 413; *Ouseley v. Anstruther*, 10 Beav. 453; *Trench v. Harrison*, 17 Sim. 111.

the debtor which follows the lands into the hands of the voluntary grantees.¹

§ 502. **Interest of the cestui que trust.** — This subject has in the main been already explained while treating of uses and trusts as they existed before the statute,² and nothing more need now be done than to refer to the more important peculiarities of modern trusts, in which they differ from uses. Generally, trusts at the present day have all the characteristics of the ancient use. They are equitable estates, and enforceable solely in equity.³

§ 503. **Liability for debts.** — For a long time, and, indeed, until within a late period, an equitable estate was not subject to liability for the debts of the beneficiary; but now in England, and in most of the States of this country, they are by statute made applicable to the satisfaction of his debts.⁴ But the trust may be so limited as that it will

¹ *Hills v. Eliot*, 12 Miss. 31; *Partridge v. Messer*, 14 Gray, 180; *Case v. Gerrish*, 15 Pick. 49; *Bliss v. Matteson*, 45 N. Y. 22; *Dewey v. Moyer*, 72 N. Y. 70; *Mann v. Darlington*, 15 Pa. St. 310; *Haston v. Castner*, 31 N. J. Eq. 697; *Kahn v. Gumbert*, 19 Ind. 430; *Jones v. Reeder*, 22 Ind. 111; *Brackett v. Waite*, 4 Vt. 339; *Salmon v. Bennett*, 1 Conn. 525; *Clark v. Douglass*, 62 Pa. St. 408; *Gridley v. Watson*, 53 Ill. 186; *Crambaugh v. Kugler*, 3 Ohio St. 544; *Filley v. Register*, 4 Minn. 391; *Fellows v. Smith*, 40 Mich. 689; *Cowen v. Alsop*, 51 Miss. 158; *Crawford v. Kirksey*, 55 Ala. 282; *Church v. Chapin*, 35 Vt. 223; *Freeman v. Burnham*, 36 Conn. 469; *Pomeroy v. Bailey*, 43 N. H. 118; *Ellinger v. Crowl*, 17 Md. 361; *Stewart v. Rogers*, 25 Iowa, 395. See also *post*, sect. 802.

² See *ante*, sects. 438, 439, 446-451.

³ Co. Lit. 290 b, note 249, sect. 14; 2 Spence Eq. Jur. 875; 1 Prest. Est. 189; 1 Spence Eq. Jur. 497; *Cholmondeley v. Clinton*, 2 Jac. & W. 148; *Burgess v. Wheate*, 1 Eden, 223; *Orleans v. Chatham*, 2 Pick. 29; *Banks v. Sutton*, 2 P. Wms. 713; *Bush's Appeal*, 33 Pa. St. 88; *Price v. Sisson*, 13 N. J. 174; 2 Pom. Eq. Jur., sect. 989; 2 Washb. on Real Prop. 454-457.

⁴ 1 Prest. Est. 144; 2 Washb. on Real Prop. 456; *Pratt v. Colt*, 2 Freem. 189; *Forth v. Duke of Norfolk*, 4 Madd. 503; *Kip v. Bank of New York*, 10 Johns. 63; *Jackson v. Walker*, 4 Wend. 462; *Foote v. Colvin*, 3 Johns. 316; *Johnson v. Conn. Bk.*, 21 Conn. 159; *Bush's Appeal*, 33 Pa. St. 85; *Hutchins v. Heywood*, 50 N. H. 491; *Bramhall v. Ferris*, 14 N. Y. 41; *Campbell v. Foster*, 35 N. Y. 361; *Lyford v. Thurston*, 16 N. H. 408; *Kennedy v. Nunan*, 52 Cal. 326; Wis. Rev. Stat. Ch. 134, sect. 37.

be terminated when an attempt is made to subject it to the debts of the *cestui que trust*. The rule seems to be well established that if the trust is executory and its duration is discretionary in the trustee, or where the trust by the terms of the deed or will is to cease upon an attempted involuntary conveyance (*i.e.*, when some creditor seizes upon the estate for the payment of a debt), or an assignment in bankruptcy, or upon the insolvency of the *cestui que trust*, these are permissible limitations upon the estate of the beneficiary, and will prevent the transfer of any interest therein to the creditors, even though there be no limitation over.¹ But it will not be permitted to a man to settle his estate in trust for himself, and so limit it that his creditors cannot touch it. The rule only extends to the settlement of such trusts by friends and relatives, whose desire is to secure means of support for the beneficiary, free from liability for his debts.²

§ 504. **Words of limitations in trusts.** — Unlike legal estates at common law, in the limitation of trusts, the same technical words are not required to be used. A trust in fee may be created without using the word *heirs*, if the intention of the grantor is manifested in any other way. And such

¹ *Nichols v. Levy*, 5 Wall. 433; *Nichols v. Eaton*, 91 U. S. 716; *Keyser v. Mitchell*, 67 Pa. St. 473; *Norris v. Johnstone*, 5 Pa. St. 287; *Rife v. Geyer*, 59 Pa. St. 393; *Leavitt v. Beirne*, 21 Conn. 1, 8; *Bramhall v. Ferris*, 14 N. Y. 41; *Markham v. Guerront*, 4 Leigh, 279; *Hallett v. Thompson*, 5 Paige, 583; *Johnston v. Zane's Trustees*, 11 Gratt. 552; *Hill v. McRae*, 27 Ala. 175; *Pope's Ex'ors v. Elliott*, 8 B. Mon. 56; *Easterly v. Kenny*, 36 Conn. 18; *Dick v. Pitchford*, 1 Dev. & B. Eq. 480; *McIlvaine v. Smith*, 42 Mo. 45; *Ashhurst v. Givens*, 5 Watts & S. 323; *Eyris v. Hetrick*, 1 Harris, 491; *Barnett's Appeal*, 10 Wright, 399-402; *Shankland's Appeal*, 11 Wright, 113; *Rowan's Creditors v. Rowan's Heirs*, 2 Duv. 412; *Frazier v. Barnum*, 4 C. E. Green, 316; *Shryock v. Waggoner*, 4 Casey, 430; *Fisher v. Taylor*, 2 Rawle, 33.

² *Lester v. Garland*, 5 Sim. 205; *Phipps v. Lord Ennismore*, 4 Russ. 131; *Mackason's Appeal*, 6 Wright, 330; *Ashhurst's Appeal*, 77 Pa. St. 464; *Brooks v. Pearson*, 27 Beav. 181. But see *Markham v. Guerant*, 4 Leigh, 279; *Johnston v. Zane's Trustees*, 11 Gratt. 552, and *Hill v. McRae*, 27 Ala. 175, where trusts for the benefit of the grantor and his wife or family have been supported against the claim of creditors.

intention will be presumed if the terms of the trust cannot in any other manner be satisfied. This rule not only refers to the quantity or duration of the equitable estate in the *cestui que trust*, but if the equitable estate under this construction is larger than the legal estate in the trustee according to the ordinary legal construction, the latter estate will be enlarged by construction to meet all the demands of the trust estate, and the trustee will take a fee, even though the estate is not limited to heirs.¹ As a corollary to the above rule, it has been well established that trustees will not take any larger legal estate than is required for the purposes of the trust. If, by the express limitation of the deed, the trustee has a larger estate, as, for example, he has a fee, and the trust is only a life estate, there is a resulting use in the remainder to the grantor and his heirs, which, under the statute, will be executed, leaving in the trustee only a legal life estate.² But these are only rules of construction by which the character and duration of the legal and equitable

¹ *Villiers v. Villiers*, 2 Atk. 71; *Oates v. Cooke*, 3 Burr. 1684; *Shaw v. Weigh*, 2 Stra. 803; *Trent v. Hanning*, 7 East, 97; *Gibson v. Montfort*, 1 Ves. sr. 485; *Loveacres v. Blight*, Cowp. 356; *Doe v. Davies*, 1 Q. B. 438; *Stanley v. Colt*, 5 Wall. 168; *Neilson v. Lagow*, 12 How. 98; *Fisher v. Fields*, 10 Johns. 505; *Gould v. Lamb*, 11 Metc. 87; *Welch v. Allen*, 21 Wend. 147; *Newhall v. Wheeler*, 7 Mass. 189; *Cleveland v. Hallett*, 6 Cush. 406; *Angell v. Rosenbury*, 12 Mich. 266; *Cumberland v. Graves*, 9 Barb. 595; *Wells v. Heath*, 10 Gray, 25; *Att'y-Gen. v. Propr's, etc.*, 3 Gray, 48; *Farquharson v. Eichelberger*, 15 Md. 73; *Deering v. Adams*, 37 Me. 264; *Pearce v. Savage*, 45 Me. 90. Words of limitation are not now required, in a number of the States, in order to create an estate in fee. The above statement applies only to those States where the common-law rule, in respect to words of limitation, still prevails.

² *Doe v. Davies*, 1 Q. B. 438; *Doe v. Barthrop*, 5 Taunt. 382; *Barker v. Greenwood*, 4 M. & W. 421; *Doe v. Timins*, 1 B. & Ald. 547; *Doe v. Nichols*, 1 B. & C. 336; *Doe v. Ewart*, 7 A. & E. 636; *Ward v. Amory*, 1 Curtis C. Ct. 419; *Morton v. Barrett*, 22 Me. 257; *Wells v. Heath*, 10 Gray, 25; *Norton v. Norton*, 2 Sandf. 296; *Bush's Appeal*, 33 Pa. St. 85; *Cleveland v. Hallett*, 6 Cush. 406; *Deering v. Adams*, 37 Me. 264; *Pearce v. Savage*, 45 Me. 90; *Renzelhausen v. Keyser*, 48 Pa. St. 351; *Farquharson v. Eichelberger*, 15 Md. 73; *Liprot v. Holmes*, 1 Ga. 381.

estates in the trust are determined where the intention of the grantor is not clearly expressed. If the estate in the trustee is expressly limited for life, the fact that it is not altogether sufficient to support the equitable estate will not enable a court of equity to enlarge it by construction.¹ And so also if the estate in the trustee is larger than the equitable estate, but the latter is uncertain and indefinite in its duration, there will be no execution of the resulting use in the grantor until the trust has terminated, or has been rendered certain. The uncertainty of duration of the trust makes the resulting use contingent.²

§ 505. **Doctrine of remainders applied to trusts.** — If the future estate in a trust is contingent, and is preceded by a particular estate, the destruction of the particular estate by the act of the first *cestui que trust*, or its natural termination before the happening of the contingency, does not defeat the contingent trust, as it would have done if the future estate had been a legal contingent remainder, or one by way of use. The future estate in a trust is altogether independent of the prior estate, and need not necessarily take effect immediately upon the termination of the latter.³ But the rule in Shelley's Case, which has already been explained, applies generally to all executed trusts, so that when an estate is limited in trust to A. for life and remain-

¹ *Waiter v. Hutchinson*, 1 B. & C. 721; *Evans v. King*, 3 Jones Eq. 387. It is possible that this strict rule would not be observed generally in this country. At any rate, even an express limitation for life to the trustees may probably be enlarged into a fee by construction, if the deed gave affirmative evidence of the donor's intention that the trustee is to have as large an estate as the nature of the trust requires.

² *Doe v. Ewart*, 7 A. & E. 636; *Doe v. Davies*, 1 Q. B. 437; *Doe v. Nichols*, 1 B. & C. 341; *Bush's Appeal*, 33 Pa. St. 85; *Morgan v. Moore*, 3 Gray, 323; *Selden v. Vermilya*, 3 Comst. 525; *Steacy v. Rice*, 27 Pa. St. 75; *Liptrot v. Holmes*, 1 Ga. 381; *Comby v. McMichael*, 19 Ala. 747; *Cumberland v. Graves*, 9 Barb. 595.

³ 2 Washb. on Real Prop. 463; *Fearne Cont. Rem.* 304, 305; 1 *Spence Eq. Jur.* 505; 1 *Prest. Abstr.* 146; *Scott v. Scarborough*, 1 Beav. 168.

der in fee to his heirs, A. will be considered *cestui que trust* in fee. But the rule does not apply to executory trusts, and wherever it is the clearly expressed intention of the grantor that the trust shall not vest in fee in the first taker, the rule will not be enforced, and the heirs will take as independent purchasers.¹

§ 506. **How created and assigned.** — Like uses before the statute, no particular form of words is necessary in the creation and declaration of trusts. Any words which manifest the intention that the person named shall have the beneficial interest in the estate will be sufficient.² And even

¹ Tud. Ld. Cas. 503, 504; 2 Washb. on Real Prop. 455; 1 Spence Eq. Jur. 503; Croxall v. Shererd, 5 Wall. 281; Tillinghast v. Coggeshall, 7 R. I. 383; Berry v. Williamson, 11 B. Mon. 245; Gill v. Logan, 11 B. Mon. 231; Williams on Real Prop. 285. But the rule in Shelley's Case has been abolished in a large number of the States. See *ante*, sect. 433.

² Co. Lit. 290 b, note 249, sect. 14; 1 Spence Eq. Jur. 506, 507; Gomez v. Tradesman's Bk., 4 Sandf. 102; Ames v. Ashley, 4 Pick. 71; Scituate v. Hanover, 16 Pick. 222; Cleveland v. Hallett, 6 Cush. 403; Montague v. Hayes, 10 Gray, 609; Orleans v. Chatham, 2 Pick. 29; Fisher v. Fields, 10 Johns. 495; Wright v. Douglass, 7 N. Y. 564; Raybold v. Raybold, 20 Pa. St. 308; Barron v. Barron, 24 Vt. 375; Ready v. Kearsley, 14 Mich. 226; Pratt v. Ayer, 3 Chand. 265; Norman v. Burnett, 25 Miss. 183; White v. Fitzgerald, 19 Wis. 480; Cockerill v. Armstrong, 31 Ark. 580; Zaver v. Lyons, 40 Iowa, 510; Smith v. Ford, 48 Wis. 115; Hill v. Den, 54 Cal. 6; Richardson v. Inglesby, 13 Rich. Eq. 59; Lyle v. Burke, 40 Mich. 499; Morrison v. Kinstra, 55 Miss. 71; Kitchen v. Bedford, 13 Wall. 413; Gadsden v. Whaley, 14 S. C. 210; Harris' Ex'ors v. Barnett, 3 Gratt. 339; Barkley v. Lane's Ex'ors, 6 Bush, 587; Russell v. Switzer, 63 Ga. 711; Wallace v. Wainwright, 87 Pa. St. 263; Porter v. Bk. of Rutland, 19 Vt. 410; Tobias v. Ketchum, 32 N. Y. 319; Selden's Appeal, 31 Conn. 548; McElroy v. McElroy, 113 Mass. 509; Wheeler v. Smith, 9 How. 55; Slocum v. Marshall, 2 Wash. C. Ct. 397; Smith v. Bowen, 35 N. Y. 83; Taft v. Taft, 130 Mass. 461; Toms v. Williams, 41 Mich. 552; Whitcomb v. Cardell, 45 Vt. 24. The words used not only must show clearly an intention to create a trust, but they must themselves create the trust, as *verba de præsenti*. A promise to create a trust, if voluntary, will not raise a trust, either express or implied, while such a promise, for a valuable consideration, would raise an implied trust, which would be enforced by a court of equity. Young v. Young, 80 N. Y. 422; Dellinger's Appeal, 71 Pa. St. 425; Hays v. Quay, 68 Pa. St. 263; Martin v. Funk, 75 N. Y. 134; Stone v. Hackett, 12 Gray, 227; Huston v. Markley, 49 Iowa, 162; Otis v. Beckwith, 49 Ill. 121;

words, which in their ordinary acceptation are precatory instead of being mandatory, when used by a testator in respect to the estate devised, will be sufficient to raise a trust, if from the whole will a clear intention to create a trust may be gathered. Thus, the words *entreat*, *desire*, *hope*, *recommend*, etc., have been held to declare a trust. But there must be no doubt or uncertainty as to the person who is to be benefited, or as to the property to be subjected to the trust, and the intention of the testator must be fully established by a fair construction of the will.¹ The declaration must, and can only, be made by the owner of the legal estate; but for the creation of the trust it is not necessary to transfer the legal estate to a third person as trustee. A simple declaration by the owner of the land that he holds it in trust for another, will transfer the beneficial interest to the latter, and convert the legal owner into a trustee, provided the requisite consideration is present in the grant.² And it is not even necessary that the declaration

Olney v. Howe, 89 Ill. 556; *Andrews v. Hobson*, 23 Ala. 219; *Wyble v. McPheters*, 52 Ind. 393; *Lane v. Ewing*, 31 Mo. 75; *Estate of Webb*, 49 Cal. 541; *Henderson v. Henderson*, 21 Mo. 379; *Neves v. Scott*, 9 How. 196; *Blanchard v. Sheldon*, 43 Vt. 512; *Minor v. Rogers*, 40 Conn. 512; *Adams v. Adams*, 21 Wall. 185; *Taylor v. Henry*, 48 Md. 550; *Owens v. Owens*, 23 N. J. Eq. 60; *McNulty v. Cooper*, 3 Gill. & J. 214; *Davis v. Ney*, 125 Mass. 590.

¹ *Pennock's Estate*, 20 Pa. St. 274-280; *Erickson v. Willard*, 1 N. H. 217; *Harper v. Phelps*, 21 Conn. 257; *Foose v. Whitmore*, 82 N. Y. 405; *Dresser v. Dresser*, 46 Me. 48; *Amee v. Johnson*, 35 Vt. 173; *Spooner v. Lovejoy*, 108 Mass. 529; *Parsley's Appeal*, 70 Pa. St. 153; *Van Duyne v. Van Duyne*, 1 McCart. 397; *Williams v. Worthington*, 49 Md. 572; *Harrison v. Harrison's Adm'r*, 2 Gratt. 1; *Cook v. Ellington*, 6 Jones Eq. 371; *Tolson v. Tolson*, 10 Gill & J. 159; *Young v. Young*, 69 N. C. 309; *Lesesne v. Witte*, 5 S. C. 450; *Ingraham v. Fraley*, 29 Ga. 553; *Lines v. Darden*, 5 Fla. 51; *Cockrill v. Armstrong*, 31 Ark. 580; *McKee's Adm'r's v. Means*, 34 Ala. 349; *Collins v. Carlisle*, 7 B. Mon. 13; *Lucas v. Lockhardt*, 10 Smed. & M. 466; *Harding v. Glyn*, 1 Atk. 469; 2 Eq. Ld. Cas. 1833-1848, 1857-1866. See also 2 Pom. Eq. Jur., sects. 1014-1017.

² 1 Spence Eq. Jur. 507; *Crop v. Norton*, 2 Atk. 76; *Suarez v. Pumpelly*, 2 Sandf. Ch. 336; *Morrison v. Beirer*, 2 Watts & S. 81; *Uraun v. Coates*, 109 Mass. 581; *Young v. Young*, 80 N. Y. 422; *Tanner v. Skinner*, 11 Bush, 120;

should be made to the proposed *cestui que trust*. It may be made without his knowledge and yet be good, if he accepts it within a reasonable time after he has heard of its existence.¹

§ 507. **Statute of Frauds.**—Before the Statute of Frauds a trust could be created or transferred by an oral declaration. No writing was necessary for its valid creation. But the Statute of Frauds requires that all *declarations* or *creations* of trusts should be *manifested* and *proved* by some instrument in writing signed by the party creating the trust. But the statute necessarily does not apply to implied, resulting and constructive trusts, and the original English statute expressly excepted them from its operation. These trusts may, therefore, be proved by parol evidence.² The statute, however, covers all express trusts, and these must invariably be proved by some writing.³ But

Taylor v. Henry, 48 Md. 550; Ray v. Simmons, 11 R. I. 266; Minor v. Rodgers, 40 Conn. 512; Gadsden v. Whaley, 14 S. C. 210; Boykin v. Pace's Ex'or, 64 Ala. 68; Hill v. Den, 54 Cal. 6; Baldwin v. Humphrey, 44 N. H. 609; Bond v. Bunting, 78 Pa. St. 210. But see Scales v. Maude, 6 De G. M. & G. 43; Wariner v. Rogers, L. R. 16 Eq. 340.

¹ Barrell v. Joy, 16 Mass. 221; Ward v. Lewis, 4 Pick. 521; Beyant v. Russell, 23 Pick. 508; Berly v. Taylor, 5 Hill, 577; Shepherd v. McEvers, 4 Johns. Ch. 136; Scull v. Reeves, 2 Green Ch. 84; Skipwith's Ex'ors v. Cunningham, 8 Leigh, 271.

² 2 Washb. on Real Prop. 445, 446, 447; 1 Spence Eq. Jur. 497, 512. See *ante*, sects. 497-501.

³ Hall v. Young, 37 N. H. 134; Bartlett v. Bartlett, 14 Gray, 278; Lloyd v. Lynch, 28 Pa. St. 419; Bragg v. Paulk, 42 Me. 502; Moore v. Moore, 38 N. H. 382; Pinney v. Fellows, 15 Vt. 525; Sturtevant v. Sturtevant, 20 N. Y. 39; Flagg v. Mann, 2 Sumn. 486; Hearst v. Pujol, 44 Cal. 230; Ratliff v. Ellis, 2 Iowa, 59; Movan v. Hays, 1 Johns. Ch. 339; Lynch v. Clements, 24 N. J. Eq. 431; Patton v. Beecher, 62 Ala. 579; Wood v. Cox, 2 My. & Cr. 684; Cornelius v. Smith, 55 Mo. 528; Ambrose v. Otty, 1 P. Wms. 322; Johnson v. Ronald, 4 Munf. 77. See Shelton v. Shelton, 5 Jones Eq. 292; Dean v. Dean, 6 Conn. 285; Osterman v. Baldwin, 6 Wall. 116; Bates v. Hurd, 65 Me. 180; Homer v. Homer, 107 Mass. 82; Faxon v. Folvey, 110 Mass. 392; Fordyce v. Willis, 3 Bro. Ch. 577; Wallace v. Wainwright, 87 Pa. St. 263; Berrien v. Berrien, 3 Green Ch. 37; McCubbin v. Cromwell, 7 Gill & J. 164; Barnes v.

it is not required that the trust shall be created by some instrument in writing. The writing is only necessary for its proof. Therefore the writing need not have been made for the purpose of creating or declaring a trust; it can act by way of an admission, as evidence of an existing trust.¹ The statute only requires the writing to show that there is a trust, and to give its limitations. If the writing is but an imperfect presentation of the trust and the terms there stated are uncertain, the trust will not be enforced. Parol evidence is not admissible to supply what has been omitted.² Letters, indorsements on envelopes, acknowledgments and admissions in equity pleadings have been held sufficient writing for the proof of a trust.³

Taylor, 27 N. J. Eq. 259; Packard v. Putnam, 57 N. H. 43; De Laurengel v. De Boom, 48 Cal. 581; Reid v. Reid, 12 Rich. Eq. 213; Kingsbury v. Burnside, 58 Ill. 310; Gibson v. Foote, 40 Miss. 788; Brown v. Brown, 12 Md. 87.

¹ 1 Cruise Dig. 390; Forster v. Vale, 3 Ves. 707; Ambrose v. Ambrose, 1 P. Wms. 322; Davies v. Otty, 33 Beav. 540; Steere v. Steere, 5 Johns. Ch. 1; Jackson v. Moore, 6 Cow. 706; McClellan v. McClellan, 65 Me. 500; Movin v. Hays, 1 Johns. Ch. 339; Unitarian Soc. v. Woodbury, 14 Me. 281; Orleans v. Chatham, 2 Pick. 29; Barrell v. Joy, 16 Mass. 221; Pinney v. Fellows, 15 Vt. 525; Flagg v. Mann, 2 Sumn. 486; Brown v. Brown, 1 Strobh. Eq. 363; Brown v. Combs, 5 Dutch, 36; Cornelius v. Smith, 55 Mo. 528; Trapnall v. Brown, 19 Ark. 48.

² Forster v. Vale, 3 Ves. 707; Wright v. Wright, 1 Ves. sr. 409; Brydges v. Brydges, 3 Ves. 120; Steere v. Steere, 5 Johns. Ch. 1; Parkhurst v. Van Courtlandt, 1 Johns. Ch. 273; Abeel v. Radcliffe, 13 Johns. 297; Walker v. Locke, 5 Cush. 90; Chadwick v. Perkins, 3 Me. 399; Patton v. Beecher, 62 Ala. 579; Russell v. Switzer, 63 Ga. 711; Wheeler v. Smith, 9 How. 55; 2 Pom. Eq. Jur., sect. 1009.

³ Forster v. Vale, 3 Ves. 696; Smith v. Matthews, 3 De G. F. & J. 139; Wright v. Douglass, 7 N. Y. 564; Montague v. Hayes, 10 Gray, 609; Pratt v. Ayer, 3 Chand. 265; Fisher v. Fields, 10 Johns. 495; Barrell v. Joy, 16 Mass. 221; Barron v. Barron, 24 Vt. 375; Hutchinson v. Tindall, 2 Green Ch. 357; Union Mut. Ins. Co. v. Campbell, 95 Ill. 267; De Laurencel v. De Boom, 48 Cal. 581; Moore v. Pickett, 62 Ill. 158; McLamie v. Portlow, 53 Ill. 340; Kingsbury v. Burnside, 58 Ill. 310; McClellan v. McClellan, 65 Me. 500; Bates v. Hurd, 65 Me. 180; Packard v. Putnam, 57 N. H. 43; Baldwin v. Humphrey, 44 N. Y. 609; Ivory v. Burns, 56 Pa. St. 300; Johnson v. Delaney, 35 Texas, 42; Cozine v. Graham, 2 Paige, 177; Patton v. Chamberlain, 44 Mich. 5; Broadrup v. Woodman, 27 Ohio St. 553.

§ 508. **How affected by want of a trustee.** — The trust is never allowed to fail because there is no trustee to hold the legal estate. And it matters not from what cause the failure of the trustee may arise, equity follows the land into whosoever hands it may fall, and compels them to hold the legal estate subject to the trust. The court will either compel the owner of the legal estate to perform the trust, or it will appoint another to act as trustee, and direct a conveyance to him.¹

§ 509. **Removal of trustees.** — The court of equity has the general power to appoint new trustees whenever the interests of the *cestui que trust* demand such appointment. If the trustee leaves the State, loses his mind, becomes insolvent, or does anything else which makes it prejudicial to the *cestui que trust* for him to remain in charge of the trust, the court may remove him and appoint another in his stead.² And although at common law the legal estate in trust, upon the death of the trustee, descended to his heirs to be administered by them, and this is still the general rule, yet if it would be beneficial to the estate that a new trustee be ap-

¹ Co. Lit. 290 b, note 249, sect. 4; 1 Cruise Dig. 403, 460; *Wilson v. Towle*, 36 N. H. 129; *Taintor v. Clark*, 5 Allen, 66; *King v. Donnelly*, 5 Paige, 46; *Shepherd v. McEvars*, 4 Johns. Ch. 136; *Stone v. Griffin*, 3 Vt. 400; *McGirr v. Aaron*, 1 Penn. 49; *Gibbs v. Marsh*, 2 Metc. 243; *Adams v. Adams*, 21 Wall. 185; *Peter v. Beverley*, 10 Pet. 532; *Burrill v. Shield*, 2 Barb. 457; *Crocheron v. Jaques*, 3 Edw. Ch. 207; *Druid Park, etc., Co. v. Dettinger*, 53 Md. 46; *Cloud v. Calhoun*, 10 Rich. Eq. 358; *Mills v. Haines*, 3 Head, 335; *Furman v. Fisher*, 4 Cald. 626; *Miller v. Chittenden*, 2 Iowa, 315; *White v. Hampton*, 10 Iowa, 244; s. c., 13 Iowa, 261; *Griffith's Adm'r v. Griffith*, 5 B. Mon. 113; *Harris v. Rucker*, 13 B. Mon. 564.

² 2 Washb. on Real Prop. 475; *Suarez v. Pumpelly*, 2 Sandf. Ch. 337; *People v. Norton*, 9 N. Y. 176; *Bowditch v. Banuelos*, 1 Gray, 220; *Farmers' Loan, etc., Co. v. Hughes*, 18 N. Y. 130; *Sparhawk v. Sparhawk*, 114 Mass. 356; *Scott v. Rand*, 118 Mass. 215; *Shepherd v. McEvers*, 4 Johns. Ch. 136; *Bloomer's Appeal*, 83 Pa. St. 45; *McPherson v. Cox*, 96 U. S. 404; *Ketchum v. Mobile, etc., R. R.*, 2 Woods, 532; *Bailey v. Bailey*, 2 Del. Ch. 95; *Satterfield v. John*, 53 Ala. 121; *No. Ca. R. R. v. Wilson*, 81 N. C. 223; *Preston v. Wilcox*, 38 Mich. 578; *Green v. Blackwell*, 31 N. J. Eq. 37; *Collier v. Blake*, 14 Kan. 250.

pointed, the court may do so.¹ By recent statutes in England, and in some of the States, the appointment of a new trustee is made to operate upon the legal title, and pass it to him from the former trustee.² But where there is no statute of that kind the appointment does not effect a transfer of the legal estate. A court of equity, in making the appointment, at the same time decrees a conveyance to the new trustee, and will punish for contempt of court if the holder of the legal title refuses.³

§ 510. **Refusal of trustee to serve.** — No one, by the unauthorized appointment of another, can be compelled to act as trustee. To make the performance of the trust obligatory, he must accept the trust expressly, or so interfere with the trust property as to raise the presumption that he has accepted.⁴ But when he has accepted it expressly or impliedly,

- 2 Washb. on Real Prop. 476, 477; 5 Kent's Com. 311; Lewin on Tr. 303; Boone v. Childe, 10 Pet. 213; Berrien v. McLane, Hoffm. Ch. 420; Clark v. Taintor, 7 Cush. 567; Warden v. Richards, 11 Gray, 277; Evans v. Chew, 71 Pa. St. 47; Gray v. Henderson, 71 Pa. St. 368; Dunning v. Ocean Nat. Bk., 6 Lans. 396; Russell v. Peyton, 4 Ill. App. 473. In New York, by statute, the trust is made to vest in the Supreme Court, instead of descending to the heirs of the deceased trustee. 1 R. S. N. Y. 730, sect. 68. See Ross v. Roberts, 2 Hun; 90; Clark v. Crego, 51 N. Y. 647. Such seems also to be the statutory rule in Michigan and Wisconsin; 2 Washb. on Real Prop. 476. If the trustee devises his trust-estate, as he may do, if not prohibited by statute, his devisee takes the place of his heir, and may perform the trust. Marlow v. Smith, 2 P. Wms. 198; Titley v. Wolstenholme, 7 Beav. 425.

² Stat. 15, 16 Vict., ch. 55, sect. 1; Mass. Gen. Stat., ch. 100, sect. 9; Parker v. Converse, 5 Gray, 336; McNish v. Guerard, 4 Strobh. Eq. 66; 1 Rev. Stat. Mo. (1879), p. 672, sect. 3930; Rev. Stat. Conn. Tit. 12, sect. 22; Taylor v. Boyd, 3 Ohio, 337; Bennett v. Williams, 5 Ohio, 461; King v. Bell, 28 Conn. 598.

³ O'Keefe v. Calthorpe, 1 Atk. 17; Ex parte Greenhouse, 1 Madd. 109; Berrier v. McLane, Hoffm. Ch. 420; Webster v. Vandeventer, 6 Gray, 428; Wallace v. Wilson, 34 Miss. 357; Shepherd v. Ross Co., 7 Ohio, 271; Young v. Young, 4 Cranch, 499.

⁴ Baldwin v. Porter, 12 Conn. 473; Scull v. Reeves, 2 Green Ch. 4; Shepherd v. McEvers, 4 Johns. Ch. 136; Lewis v. Baird, 3 McLean, 58; Eyrick v. Hetrick, 13 Pa. St. 488; Cloud v. Calhoun, 10 Rich. Eq. 358; Flint v. Clin-

he cannot of his own motion abandon it, or refuse to perform the duties. The court may, in the exercise of its discretion, relieve him from his obligation or compel him to serve, whichever course best subserves the interests of the *cestui que trust*.¹ If the trustee named refuses to act it would have no greater effect upon the validity of the trust than would his death, or a failure to name a trustee in the deed creating the trust. Another trustee would be appointed to take his place. But the refusal must be a positive disclaimer of the trust; for otherwise the law will presume that the trust is beneficial to the trustee as well as the *cestui que trust*, and that they both have accepted it. A mere oral declination will not prevent the declining trustee from subsequently entering upon the performance of the trust, if his place has not actually been filled by the appointment of another; and, as a general rule, the court will not make such an appointment until the trustee has made a more formal disclaimer.²

§ 511. **Survivorship.** — If there are more than one trustee they take and hold the legal estate in joint-tenancy. If, therefore, one of them dies, the estate vests in the sur-

ton Co., 12 N. H. 430; *Goss v. Singleton*, 2 Head, 67; *Lyle v. Burke*, 40 Mich. 499; *White v. Hampton*, 13 Iowa, 259; *Hearst v. Pojol*, 44 Cal. 230; *Adams v. Adams*, 21 Wall. 185; *Armstrong v. Morrill*, 14 Wall. 120; *Montford v. Cadogan*, 17 Ves. 485; *Urch v. Walker*, 3 My. & Cr. 702.

¹ *Shepherd v. McEvers*, 4 Johns. Ch. 136; *Tainter v. Clark*, 5 Allen, 66; *Cruger v. Halliday*, 11 Paige, 319; *Bowditch v. Banuelos*, 1 Gray, 220; *Gilchrist v. Stevenson*, 9 Barb. 9; *People v. Norton*, 9 N. Y. 176; *Drane v. Gunter*, 19 Ala. 731; *Deefendorf v. Speaker*, 16 N. Y. 246; *In re Bernstein*, 3 Redf. 20; *Wilkinson v. Parry*, 4 Russ. 272; *Greenwood v. Wakeford*, 1 Beav. 576; *Forshaw v. Higginson*, 20 Beav. 485.

² *Tainter v. Clarke*, 13 Metc. 220; *Judson v. Gibbons*, 5 Wend. 224; *Goss v. Singleton*, 2 Head, 77; *McCosker v. Brady*, 1 Barb. Ch. 329; *White v. Hampton*, 13 Iowa, 259; *Cloud v. Calhoun*, 10 Rich. Eq. 358; *Adams v. Adams*, 21 Wall. 185; *Flint v. Clinton Co.*, 12 N. H. 430; *Eyrick v. Hetrick*, 13 Pa. St. 488; *Lyle v. Burke*, 40 Mich. 499; *King v. Donnelly*, 5 Paige, 46; *Putnam's Free School v. Fisher*, 30 Me. 526; *Jones v. Moffett*, 5 Serg. & R. 523.

vivors to the exclusion of the heirs of the deceased trustee, and they are generally competent to administer the trust. This rule is without limitation when applied to executed trusts, but whether an executory trust survives depends upon the amount of personal confidence reposed in them all as one body.¹ If the special powers in an executory trust are granted to the trustees *ratione officii*, i.e., given in general terms to "my trustees," the ordinary construction is that such trust powers survive.² But if they are granted to them *nominatim*, indicating a personal confidence in the discretion of each, there will be no survivorship.³ The same rule governs the right to exercise trust powers of the new trustee appointed by the court. Ordinary trust powers may be exercised by him, but those involving a personal confidence die with the removal of the trustee, in whom the confidence was reposed.⁴

§ 512. **Merger of interests.** — If the legal and equitable estates of a trust become lawfully united in one person, the equitable is merged in the legal estate, in accordance with the general law of merger. But the conjunction of the two

¹ *Lane v. Debenham*, 11 Hare, 188; *Cole v. Wade*, 16 Ves. 28; *Warburton v. Sands*, 14 Sim. 622; *Franklin v. Osgood*, 14 Johns. 558; *Peter v. Beverly*, 10 Pet. 564; *Jackson v. Schaubert*, 7 Cow. 194; *Stewart v. Pettus*, 10 Mo. 755; *Burrill v. Shield*, 2 Barb. 457; *Saunders v. Schmaelzle*, 49 Cal. 59. In New York, if one of two or more trustees resign, the others have not the power to execute the trust, in the same manner as if he were dead. Another trustee must be appointed in his place. *Van Wick's Petition*, 1 Barb. Ch. 570.

² *Peter v. Beverly*, 10 Pet. 564; *Jackson v. Given*, 16 Johns. 167; *Tainter v. Clarke*, 13 Metc. 220; *Zebach v. Smith*, 3 Binn. 69; *Gray v. Lynch*, 8 Gill, 403; *Bloomer v. Waldin*, 3 Hill, 365; *Bergen v. Duff*, 4 Johns. Ch. 308; *Franklin v. Osgood*, 14 Johns. 553; *Co. Lit.* 113 a; note, 146; *Story's Eq. Jur.*, sect. 1062; *Cole v. Wade*, 16 Ves. 28; *Wells v. Lewis*, 4 Metc. (Ky.) 271; *Lewin on Tr.* 239.

³ See preceding note, and *post*, sect. 566.

⁴ *Cole v. Wade*, 16 Ves. 41; *Hibbard v. Lamb*, Ambl. 309. *Doyley v. Att'y Gen.*, 2 Eq. Cas. Abr. 195; *Burrill v. Shield*, 2 Barb. 457; *Lewin on Tr.* 239.

estates in one person will not produce a merger, if it would be prejudicial to the rights of any one lawfully interested in the trust property. As a general rule it is necessary that the equitable estate should be of equal extent with the legal estate, so that a merger might take place.¹

§ 513. **Rights and powers of trustees.** — Their rights and powers must necessarily vary materially with the character and terms of the trust. So also do the rights and powers of the *cestui que trust*. The authority of the former is greatest and the powers of the latter are least in the case of executory trusts, while the converse is true of passive trusts. The powers, that either may have in active trusts and which are peculiar to such trusts, are wholly dependent upon the particular provisions of each trust, and no general rules can be laid down in explanation of them. It may be said of every species of trusts that possessory actions, and actions for the protection of the legal estate, must be brought by the trustee. The *cestui que trust* cannot maintain them. In a court of law the trustee is deemed to be entitled to the possession of the land, and may even oust the *cestui que trust* from possession. The latter, if in possession, holds it merely as a tenant at sufferance or at will.² Where there

¹ 3 Prest. Conv. 1 Spence Eq. Jur. 508, 572; *Nicholson v. Halsey*, 7 Johns. Ch. 422; *Rogers v. Rogers*, 18 Hun, 409; *Gardner v. Gardner*, 3 Johns. Ch. 53; *Hopkinson v. Dumas*, 42 N. H. 307; *Bolles v. State Trust Co.*, 27 N. J. Eq. 308; *Cooper v. Cooper*, 1 Halst. Ch. 9; *James v. Morey*, 2 Cow. 284; *Donalds v. Plumb*, 8 Conn. 453; *Mason v. Mason*, 2 Sandf. Ch. 432; *Healy v. Alston*, 25 Miss. 190; *Badgett v. Keating*, 31 Ark. 400; *Hunt v. Hunt*, 14 Pick. 374; *Downes v. Grazebrook*, 3 Meriv. 208; *Brydges v. Brydges*, 3 Ves. 126; *Selby v. Alston*, 3 Ves. 339; *Wade v. Paget*, 1 Bev. Ch. 363; *Butler v. Godley*, 1 Dev. 94.

² 1 Cruise Dig. 414; 2 Pom. Eq. Jur., sect. 991; 2 Washb. on Real Prop. 483; *Russell v. Lewis*, 2 Pick. 508; *Woodman v. Good*, 6 Watts & S. 169; *Newton v. McLean*, 41 Barb. 289; *Trustees, etc., v. Stewart*, 27 Barb. 553; *Jackson v. Van Slick*, 8 Johns. 487; *Beach v. Beach*, 14 Vt. 28; *Mordecai v. Parker*, 3 Dev. 425; *Hepburne v. Hepburne*, 2 Bradf. 74; *William's Appeal*, 83 Pa. St. 377; *Freeman v. Cooke*, 6 Ired. Eq. 373; *Allen v. Inlet*, 1 Holt,

are two or more trustees all must join in any formal act under the trust, particularly if the exercise of discretion is required, as in the case of a sale of the trust property.¹ In ordinary informal proceedings the act of one is deemed to be the act of all. But they are not responsible for the unlawful acts of each other, unless they participate in the wrongful acts, or are guilty of negligence in the discharge of their duties, and the wrongful act could have been prevented by the exercise of ordinary care.² Whenever the

641; *May v. Taylor*, 6 Man. & Gr. 261; *White v. Albertson*, 3 Dev. 241; *Aikin v. Smith*, 1 Sneed, 304; *Stone v. Bishop*, 4 Cliff. 593; *Kennedy v. Fury*, 1 Dall. 72; *Brown v. Combs*, 5 Dutch. 36; *Gunn v. Barrow*, 17 Ala. 743; *Fitzpatrick v. Fitzgerald*, 13 Gray, 400. And as the legal owner of the land, he is bound to use all proper diligence in collecting rents and profits, and paying off all taxes and other charges against the estate. *Mansfield v. Alwood*, 84 Ill. 497; *Hepburne v. Hepburne*, 2 Bradf. 74.

¹ *Cole v. Wade*, 16 Ves. 28; *Townsend v. Wilson*, 1 B. & Ald. 608; *Sinclair v. Jackson*, 3 Jo. 43; *Ridgeley v. Johnson*, 11 Barb. 527; *Franklin v. Osgood*, 14 Johns. 553; *Peter v. Beverley*, 10 Pet. 564; *Latrobe v. Tiernan*, 2 Md. Ch. 474; *Wilbur v. Almy*, 12 How. 180; *Taylor v. Dickinson*, 15 Iowa, 484; *Story's Eq. Jur.*, sect. 1280; 1 Cruise Dig. 455. If, however, the trust is a public one, the rule does not apply. In public trusts, in the absence of any special rule or by-law, a majority of the trustees are competent to act. *Wilkinson v. Malin*, 2 Tyrwh. 544; *Hill v. Josselyn*, 13 Smed. & M. 597; *Chambers v. Perry*, 17 Ala. 726.

² The trustee cannot leave the entire control of the property in the hands of his co-trustees. And, if in consequence of such surrender, which is in itself a clear neglect of duty, the co-trustee has been enabled to violate the trust, the former will be responsible for the wrongful acts of the latter, whether they be acts of commission or omission. *Kip v. Deniston*, 4 Johns. 23; *Ward v. Lewis*, 4 Pick. 518; *Banks v. Wilkes*, 3 Sandf. Ch. 99; *Towne v. Ammidon*, 20 Pick. 535; *Spencer v. Spencer*, 11 Paige, 299; *Pim v. Downing*, 11 Serg. & R. 66; *Jones' Appeal*, 8 Watts & S. 143; *Ringgold v. Ringgold*, 1 Har. & G. 11; *Latrobe v. Tiernan*, 2 Md. Ch. 474; *Wayman v. Jones*, 4 Md. Ch. 500; *State v. Guilford*, 15 Ohio, 593; *Rayall's Adm'or v. McKenzie*, 25 Ala. 363; *Edmonds v. Crenshaw*, 14 Pet. 166; *Worth v. McAden*, 1 Dev. & B. Eq. 199; *Hall v. Carter*, 8 Ga. 388; *Schenck v. Schenck*, 1 C. E. Green, 174; *Maccubbin v. Cromwell's Ex'rs*, 7 Gill & J. 157; *Irwin's Appeal*, 35 Pa. St. 294; *Graham v. Davidson*, 2 Dev. & B. Eq. 155. But if he is not the acting trustee, and merely joins in the execution of the trust in some particular matter for the sake of formality, as where he signs a receipt for money paid to the co-trustee, he will not be liable for a misappropriation by the co-trustee.

trustees violate the rights of the *cestui que trust*, or fail or refuse to perform their duty, courts of equity are the proper courts to apply to for relief. And the decrees of those courts are paramount in all questions relating to the powers and duties of the parties to a trust.¹

§ 514. **Rights and powers of cestuis que trust.** — Where it is a passive trust, the rights of the *cestui que trust* are in equity almost equivalent to legal ownership. The trustee has the bare legal title, and may be compelled by chancery to do whatever in respect to the legal title is necessary for the beneficial enjoyment of the property by the *cestui que trust*. The latter is entitled to the possession, can collect the rents and profits and apply them to his use. But the *cestui que trust* can only acquire possession against the will of the trustee by means of a decree in equity. A court of law would sustain an action of ejectment by the trustee. A

Brice v. Stokes, 11 Ves. 319; Ingle v. Partridge, 32 Beav. 661; Peter v. Beverly, 10 Pet. 531; 1 How. 134; Taylor v. Benham, 5 How. 233; Sinclair v. Jackson, 8 Cow. 543. See Ormiston v. Olcott, 84 N. Y. 339; Brice v. Stokes, 2 Eq. Ld. Cas. 1748-1805.

¹ Jones v. Dougherty, 10 Ga. 373; Tucker v. Palmer, 3 Brev. 47; Bush v. Bush, 1 Strobb Eq. 377; Den v. Troutman, 7 Ired. 155; McLean v. Nelson, 1 Jones L. 396; Robinson v. Mauldin, 11 Ala. 997; Hes v. Martin, 69 Ind. 114; Pressly v. Stribling, 24 Miss. 527; James v. Cowing, 82 N. Y. 449; Williams v. Dwinelle, 51 Cal. 442. If the duty of the trustee be purely discretionary, the court will not compel an execution. Stanley v. Colt, 5 Wall. 168; See *post*, sect. 574. Nor will the court attempt to control the discretion of a trustee in any manner, except to prevent an unreasonable exercise of it, which, on account of the injury to the beneficiaries, could not have been intended by the donor. Arnold v. Gilbert, 3 Sandf. Ch. 531; Morton v. Southgate, 28 Me. 41; Zubriskie's Ex'ors v. Wetmore, 26 N. J. Eq. 18; Littlefield v. Cole, 33 Me. 552; Leavitt v. Beirne, 21 Conn. 1; Goddard v. Brown, 12 R. I. 31; Pulpess v. African Ch., 48 Pa. St. 204; Haydell v. Hurck, 5 Mo. App. 267; Starr v. Moulton, 97 Ill. 525; Vallette v. Bennett, 69 Ill. 632; Phelps v. Harris, 51 Miss. 789; Luige v. Luchesi, 12 Nev. 306; Rammelsburg v. Mitchell, 29 Ohio St. 22; Brophy v. Bellamy, L. R. 8 Ch. 798; Bankes v. Le Despencer, 11 Sim. 508; Costabadie v. Costabadie, 6 Hare, 410; Mauser v. Dix, 8 De G. M. & G. 371; Prendergast v. Prendergast, 3 H. L. Cas. 195.

court of equity will grant the possession to the *cestui que trust* if consistent with the trust, and for a further protection may enjoin the trustee from proceeding at law in ejectment.¹

§ 515. **Alienation of trust estate.** — It is also a well-established rule that the trustee of a dry or passive trust may be compelled by decree in chancery to convey the estate as the *cestui que trust* may direct. And this rule, it would seem, applies to every species of trust where such a decree is not inconsistent with the express terms of the trust. Equity will give to the *cestui que trust* the full power to dispose of the estate, whenever it can do so without violating the express or implied purpose of the trust, and without doing injury to any one interested therein. Where there is no prohibition against alienation the execution of the deed of conveyance by trustee and *cestui que trust* passes the absolute title, and the trust is destroyed by the consequent merger of interests.² To what extent these general powers exist in an active trust must depend upon the peculiar limitations of such trust. Wherever the power of the trustee involves the exercise of a proprietary authority over the

¹ Lewin on Tr. 23, 470, 480; Shankland's Appeal, 47 Pa. St. 113; Harris v. McElroy, 45 Pa. St. 216; Stevenson v. Lesley, 70 N. Y. 512; Battle v. Petway, 5 Ired. 576; Williamson v. Wilkins, 14 Ga. 416; Guppill v. Isbell, 2 Bailey 230; Presley v. Stribling, 24 Miss. 527; Heard v. Baird, 40 Miss. 800; Stewart v. Chadwick, 8 Iowa, 469. See Watts v. Ball, 1 P. Wms. 108; Lewis v. Lewis, 1 Car. 102; Cholmondeley v. Clinton, 4 Bligh, 115. But if there are other persons interested in the estate the court may either refuse to decree the possession to the *cestui que trust*, or impose such conditions and restrictions as may be necessary for the protection of the other beneficiaries. Shankland's Appeal, *supra*; Harris v. McElroy, *supra*; Battle v. Petway, *supra*; Williamson v. Wilkins, *supra*.

² 1 Cruise Dig. 448; Lewin on Tr. 470; Vaux v. Parke, 7 W. & S. 19; Harris v. McElroy, 45 Pa. St. 216; Barnett's Appeal, 46 Pa. St. 399; Battle v. Petway, 5 Ired. 576; Arrington v. Cherry, 10 Ga. 429; Stewart v. Chadwick, 8 Iowa, 469.

property equity will regard him as the owner so far as it is necessary for the performance of the trust. And to that extent will the rights and powers of the *cestui que trust* be curtailed.¹

§ 516. **Liability of third persons for performance of the trust.** — It has been held in England, and in some of the American States, where a trustee has a power of sale, that the land in the hands of purchasers is subjected to a constructive trust, which compels the purchasers to see to the proper application of the purchase-money. This doctrine has been warmly contested and denied in many of the States, and presumably the rule is generally limited to such cases where the trust is special and the sale is for a special purpose, as for the satisfaction of a particular debt or claim. Where the trust is general it is impossible for the purchaser to secure a proper application of the purchase money, and he is not held liable for any misappropriation by the trustee.²

§ 517. **Compensation of trustee.** — Formerly the trustee was not entitled to any compensation for his services, it being considered a matter of honor. The policy of the law in respect thereto has since been changed, and it is now almost the universal rule that trustees receive a reasonable

¹ Lewin on Tr. 470; Barnett's Appeal, 46 Pa. St. 399; McCosker v. Brady 1 Barb. Ch. 329; 1 Spence Eq. Jur. 496, 497; Culbertson's Appeal, 76 Pa. St. 145; Williams' Appeal, 83 Pa. St. 377; Smith v. Harrington, 4 Allen, 566; Bowditch v. Andrew, 8 Allen, 339; Douglass v. Cruger, 80 N. Y. 15. But when the duties which have made the trust active have been performed, the trust again becomes passive, and if it is not executed by the Statute of Uses, the court may direct a conveyance by the trustee in accordance with the desires of the *cestui que trust*. Welles v. Castles, 3 Gray, 323; Sherman v. Dodge, 28 Vt. 26; Waring v. Waring, 10 B. Mon. 331; Leonard's Lessee v. Diamond, 31 Md. 536; Perry on Tr., sect. 351.

² Story Eq. Jur., sects 1127, 1130; 1 Cruise Dig. 450; Potter v. Gardner, 12 Wheat. 498; Duffy v. Calvert, 6 Gill, 487; Dunch v. Kent, 1 Vern. 260; Spalding v. Shalmer, 1 Vern. 301; Andrews v. Sparhawk, 13 Pick. 393; Davis v. Christian, 15 Gratt. 11; Stall v. Cincinnati, 16 Ohio St. 169.

percentage — usually five per cent — upon all disbursements made by them. But they are not permitted to make any further charge against the trust estate, even though the services rendered may be unusual, and for the performance of which they may have hired others.¹

¹ Story Eq. Jur., sect. 1266; 1 Cruise Dig. 451; *Robinson v. Pett*, 2 Eq. Ld. Cas. 512, 538-600 (4th Am. ed.); *Meacham v. Sternes*, 9 Paige Ch. 398; In the Matter of Schell, 53 N. Y. 9 Paige, 263; *Denny v. Allen*, 1 Pick. 147; *Barrell v. Joy*, 16 Mass. 221; *Singleton v. Lowndes*, 9 S. C. 465; *Hall v. Hall*, 78 N. Y. 535; *Warbass v. Armstrong*, 2 Stockt. Ch. 263; *Wagstaff v. Lowerne*, 23 Barb. 209. But see *Constant v. Matteson*, 22 Ill. 546; *Mayor v. Galluchat*, 6 Rich. Eq. 1.

CHAPTER XIV.

EXECUTORY DEVISES.

SECTION 530. Nature and origin.

- 531. Executory devises, vested or contingent.
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- 533. Distinguished from devises *in præsentia*.
- 534. Reversion of estate undisposed of.
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§ 530. **Nature and origin.** — An executory devise is a future interest or estate in lands limited in a will in such a manner that it cannot take effect as a remainder or as a future use. The law of executory devises has been evolved by a course of judicial legislation based upon the Statute of Wills enacted in the reign of Henry VIII.¹ The cardinal rule for the construction of wills is that the intention of the testator must be carried out, if at all possible. In conformity with this liberal rule of construction, the common-law rules for the limitation of future interests in real property were discarded, and estates or interest were created and recognized under the name of executory devises, which could not have been created at common law by deed. Mr. Fearne

¹ See *post*, sect. 372.

defines an executory devise to be "such a limitation of a future estate or interest in lands as the law admits in the case of a will, though contrary to the rules of limitation in conveyances at common law."¹ A remainder, the only common-law estate which could be directly created by conveyance, has been defined to be a future estate in lands which is preceded and supported by a particular estate in possession, which takes effect in possession immediately upon the determination of the prior or particular estate, and which is created at the same time and by the same conveyance.² It follows, therefore, that every devise of a future estate, which is not preceded by a particular estate created by the same instrument, or which, if there is such a prior limitation, takes effect in possession *before* or *after* the natural expiration of the prior limitation, is an executory devise.³ An executory devise was once held to be an interest somewhat different from an estate, although not a mere naked possibility.⁴ But whatever need there may have been for such refined distinctions in the incipient stages of the growth of those interests, none exists now, and for all practical purposes executory devises may be considered as estates in land, having all the characteristics and appurtenances of a common-law estate, differing from the latter only in the mode of creation and limitation. They are alienable

¹ Fearne Cont. Rem. 386; 2 Washb. on Real Prop. 680; 2 Bla. Com. 172; 4 Kent's Com. 264; 2 Jar. on Wills (5th Am. ed.), 488; *Purefoy v. Rogers*, 2 Lev. 39; *s. c.*, 2 Saund. 388; *Goodright v. Cornish*, 4 Mod. 258; *McRee's adm'rs v. Means*, 34 Ala. 349.

² See *ante*, sect. 396.

³ *Moore v. Parker*, 1 Ld. Raym. 37; *Doe v. Scarborough*, 3 Ad. & El. 2, 897; *Key v. Gamble*, 2 Jones, 123; *Gore v. Gore*, 2 P. Wms. 28; *Harris v. Barnes*, 4 Burr. 2157; *Doe v. Morgan*, 3 T. R. 763; *Bullock v. Stone*, 2 Ves. 521.

⁴ In *Jones v. Roe*, 3 T. R. 88, Chief Justice Willes says: "Executory devises are not naked possibilities, but are *in the nature* of contingent remainders." See *Wright v. Wright*, 1 Ves. sr. 411; *Hamington v. Rudgard*, 10 Rep. 52 b.

and devisable in equity, whether the devise is vested in title or contingent, and descendible to the devisee's heirs, if he should die before the devise vests in possession.¹

§ 531. **Executory devises, vested or contingent.**—The devise is vested where the person who is to take is *in esse*, and is ascertained, and where the event upon which he is to take is also certain. Such a devisee takes a vested future estate. Where the estate is to vest upon an uncertain event or in a person not definitely ascertained, the executory devise is contingent, and partakes of the nature of a contingent remainder.

§ 532. **Classes of executory devises.**—Some of the writers have indulged in a minute subdivision of executory devises, but it tends apparently to obscure and mystify, rather than to classify, the subject, and it will be disregarded, and the following simple subdivision employed in its stead: *First*, where the devise takes effect in the future without a sufficient preceding limitation to support it; *secondly*, where the devise vests in derogation of a preceding limitation, and *thirdly*, where the devise is a future limitation in a chattel

¹ *Purefoy v. Rogers*, 2 Wm. Saund. 388; *Wright v. Wright*, 1 Ves. sr. 409; *Jones v. Roe*, 3 T. R. 88; *Proprietors Brattle Sq. Church v. Grant*, 3 Gray, 161; *Hall v. Chaffee*, 14 N. H. 215; *Edwards v. Varick*, 5 Denio, 664; *Stover v. Eycleshimer*, 46 Barb. 87; *Den v. Manners*, 1 Spence, 142; *Kean v. Hoffecker*, 2 Harr. 103; *Hall v. Robinson*, 3 Jones Eq. 348. Mr. Washburne states that executory devises are alienable only when the devisee is an ascertained person (2 Washb. on Real Prop. 681), and this seems to be the generally accepted doctrine. But, as has been stated in respect to the alienability of contingent remainders (see *ante*, sect. 411, note), since the conveyance of a future contingent interest only operates in equity by way of estoppel, if a grant of the executory devise is made by one who, although not yet ascertained to be the devisee, becomes the devisee subsequently by the happening of the contingency by which the devisee is to be ascertained, his grant would by estoppel convey to his grantee the interest which he thus subsequently acquires. See *post*, sects. 727, 730, incl.

interest.¹ The third class will be considered in a subsequent paragraph. The first class would not only include those cases where the future limitation is not preceded by *any* particular limitation, but also those where the preceding limitation is not sufficient to support the future estate as a remainder. Where the executory devise is vested, the preceding limitation may be insufficient by terminating naturally before the former is to take effect. And where the devise is contingent, the preceding limitation would be insufficient not only for the cause just mentioned, but also when it is not a freehold estate. In any one of these cases the future limitations, whether vested or contingent, will take effect as executory devises.² The second class includes all future estates, which by vesting defeat or curtail a prior limitation.³ This class is also called conditional limitations, and corresponds to shifting uses, while the first class is similar to springing uses, but containing other cases which as uses would be void contingent uses, viz.: where the preceding limitation is not sufficient to support the future estate.⁴

§ 533. **Distinguished from devises in præsentī.** — Ordinary devises vest at the death of the testator, and if for any

¹ This is the subdivision employed by Mr. Fearne, Mr. Cruise, and Mr. Washburn. Fearne Cont. Rem. 399; 6 Cruise Dig. 366; 2 Washb. on Real Prop. 683. See *Scatterwood v. Edge*, 1 Salk. 229; *Nightingale v. Burrell*, 15 Pick. 104.

² 2 Washb. on Real Prop. 684; Fearne Cont. Rem. 400; 2 Bia. Com. 173; *Leslie v. Marshall*, 31 Barb. 566; *Chambers v. Wilson*, 2 Watts, 495; *Reding v. Stone*, 8 Vin. Abr. 215, pl. 5; *Thelluson v. Woodford*, 1 Bos. & P. N. R. 357; *Snowe v. Cutter*, 1 Lev. 135; *Clarke v. Smith*, 1 Lutw. 798; *Key v. Gamble*, 2 Jones, 123; *Doe v. Scarborough*, 3 Ad. & El. 2, 897.

³ *Doe v. Fonnereau*, 1 Dougl. 487; *Marks v. Marks*, 10 Mod. 423; *Nicholl v. Nicholl*, 2 W. Bl. 1159; *Doe v. Heneage*, 4 T. R. 13; *Stanley v. Stanley*, 16 Ves. 491; *Carr v. Erroll*, 6 East, 58; *Doe v. Beauclerk*, 11 East, 657; *Proprietors Brattle Sq. Church v. Grant*, 3 Gray, 146; *Brightman v. Brightman*, 100 Mass. 238; *Jackson v. Blanshau*, 3 Johns. 299; *Hatfield v. Sneden*, 42 Barb. 615; *s. c.*, 54 N. Y. 285; *Hilliary v. Hilliary's Lessee*, 26 Md. 274.

⁴ See *ante*, sects. 482–484, 487.

cause the devisee is unable to take at that time, the devise lapses. Its vesting will not be suspended, and it kept alive as an executory devise, until the devisee is able to take. Where, therefore, the devise is, in express words or by necessary implication, to vest immediately upon the death of the testator, it cannot under any circumstances be construed to be a future or executory devise, in order to carry out the supposed intention of the testator that the devise shall at all events take effect. Thus, a devise to the heirs of A., standing alone, would be considered a devise *in præsentî*, and if A. should be living at the testator's death, the devise would lapse for the want of some ascertained person in being. In order to make such a devise executory, it must expressly or by implication refer to the death of A., as the time when the devise is to take effect.¹ But the courts will avail themselves of very slight circumstances in order to reach that conclusion.²

¹ 2 Washb. on Real Prop. 685; 6 Cruise Dig. 422; Doe v. Carleton, 1 Wils. 225; Goodright v. Cornish, 1 Salk. 226; Porter's Case, 1 Rep. 24; Ingliss v. Trustees, etc., 3 Pet. 99; Leslie v. Marshall, 31 Barb. 565. See *post*, sects. 882, 884.

² Goodright v. Cornish, 1 Salk. 226; Harris v. Barnes, 4 Burr. 2157; Yeaton v. Roberts, 28 N. H. 465; Holderby v. Walker, 3 Jones Eq. 46; Thompson v. Hoop, 6 Ohio St. 480; Darcus v. Crump, 6 B. Mon. 365. Thus, if there is a devise to the children of A. *to be begotten*, although the devise would, without the words in italics, have been construed as a devise *in præsentî*, and would have been confined to the children born at the testator's death, the presence of the words *to be begotten*, or other words of similar import, would be sufficient evidence of the intention of the testator to include all the children of A., whether they are born *before* or *after* his death, and the devise would, therefore, be executory. Mogg v. Mogg, 1 Meriv. 654; Newill v. Newill, L. R. 12 Eq. 432; Eldowes v. Eldowes, 30 Beav. 603; Annable v. Patch, 3 Pick. 360; Hoge v. Hoge, 1 Serg. & R. 144; Rupp v. Eberly, 79 Pa. St. 141; Napier v. Howard, 3 Ga. 202; Dunn v. Bk. of Mobile, 2 Ala. 152. And where there are no persons *in esse*, who would come under the class of devisees named at the time of the testator's death, nor had there been any before his death, it seems to be the presumption of law that the testator intended to create an executory devise. Shepherd v. Ingram, Amb. 448; Weld v. Bradbury, 2 Vern. 705; Doe

§ 534. **Reversion of estate undisposed of.** — Where there is no limitation preceding the executory devise, the estate descends to the testator's heirs and remains in them until the event happens, when the devise is to take effect. And if the executory devise is an estate less than a fee simple, the land will revert to the heirs upon its termination.¹ If the preceding limitation is not sufficient to support the future limitation as a contingent remainder, and the former expires before the latter vests, there will be an intermediate reversion of the estate to the heirs. The same general principles would apply to executory devises of the second class. The only difficulty experienced in applying them is when the vesting and enjoyment of the executory devise do not absolutely require the destruction of the entire preceding estate, as where the former is a particular estate and the latter is a fee. Thus, where the land is devised to A. and his heirs, and, upon the happening of some contingency to B. for life, it is a mooted question, both sides sustained by eminent authority, whether the estate in A. would be destroyed altogether by the vesting of B.'s estate for life, or whether A. is only divested of his estate during the continuance of B.'s estate, and retains the reversion in him and his heirs. Mr. Fearne supports the former view, while the latter is maintained by Mr. Preston, Mr. Powell, and Mr.

v. Carleton, 1 Wils. 225; *Haughton v. Harrison*, 2 Atk. 329; *Ross v. Adams*, 28 N. J. L. 160. And where there is a devise to children, or some other definite class of persons, and some of them are born and others are unborn at the testator, or where none are born then, but some come into being afterwards, leaving others which are subsequently born, those who are in being take vested estates, and are entitled to the whole income until the others are born, when the devise opens and lets them in. These executory devises have a close resemblance to *remainders to a class*. *Shepherd v. Ingram*, Amb. 448; *Mainwaring v. Beever*, 8 Hare, 44; *Shawe v. Cunliffe*, 4 B. C. 144; *Mills v. Norris*, 5 Ves. 335; *Stone v. Harrison*, 2 Call, 715. See *ante*, sect. 402.

¹ 2 Washb. on Real Prop. 686, 687; 2 Prest. Abst. 120; 4 Kent's Com. 268.

Washburn.¹ The intention of the testator certainly must govern in such a case. If a fee simple be devised to one, there is a manifest intention on the part of the testator to deprive his own heirs of any interest in the land. If he attaches thereto an executory devise to B. for life, in the absence of any express evidence to the contrary, it only so far negatives the presumed intention that A. should have the fee as is required to give to B. an estate for his life. Upon the vesting of B.'s estate the present estate in A. would be only suspended until B.'s death, when the estate will revert to him and his heirs.²

§ 535. **Distinguished from uses.** — Uses may be created by devise as well as by deed, and a future limitation in a will will not be construed as an executory devise if it is limited as a use, especially if there is a seisin raised by the will to support the use. Thus, where the devise is to A. to the use of B., the Statute of Uses would be required to operate upon the devise and transfer the legal estate from A. to B.³ But the mere expression "to the use of" appearing in a devise will not

¹ 2 Washb. on Real Prop. 686; Fearne Cont. Rem. 251; 2 Prest. Abst. 140; 2 Pow. Dev. 241. Mr. Washburn states that a case, involving this question, is said to have arisen in the Delaware courts. p. 687.

² Mr. Powell says: "To this important rule, namely, that an estate subject to an executory devise, to arise on a given event, is, on the happening of that event, defeated only to the extent of the executory interest, the only possible objection that can be advanced is the total absence of direct authority for it, for the books do not furnish a single example of its application." 2 Pow. Dev. 241.

³ Co. Lit. 271 b, note 231, sect. 3; Sandf. on Uses, 243; 2 Washb. on Real Prop. 433, 434. Whether the use will be executed by the statute, or remain a trust, leaving the legal title in the devisee as trustee, is governed by the same rules which apply to uses created by act *inter vivos*. See *Doe v. Field*, 2 B. & Ad. 564; *Doe v. Homfray*, 6 A. & E. 206; *Norton v. Leonard*, 12 Pick. 152; *Ayer v. Ayer*, 16 Pick. 327; *Upham v. Varney*, 15 N. H. 467; *Wood v. Wood*, 5 Paige Ch. 596.

necessarily convert the devise into a use, and it is held that a simple devise to the use of A. will take effect as an executory devise.¹

§ 536. **Distinguished from remainders.** — Whenever a future limitation in a devise can take effect as a remainder, it will be construed as such. It cannot operate as an executory devise. This rule of construction arises from the desire of the courts to confine themselves to common-law estates and the rules governing them; and the doctrine of executory devises is recognized and applied only when the intention of the testator cannot otherwise be effectuated.² What are the requisites and characteristics of remainders have been already discussed, and it will be necessary to mention here only certain important cases in which doubt may arise. In respect to the first class of executory devises where there is no sufficient particular estate, or none at all, no question can arise as to the proper construction. The difficulty is presented in the second class, in determining whether the second limitation takes effect in derogation of the prior estate.

§ 537. **Same — Limitation after a fee.** — It has been seen that a remainder cannot be limited after a fee.³ And where the preceding estate is in fact a fee, whether it is

¹ 1 Sugden on Pow. 2, 3.

² *Purefoy v. Rogers*, 2 Wm. Saund. 388; *Doe v. Morgan*, 3 T. R. 763; *Doe v. Fonnereau*, Dougl. 487; *Doe v. Considine*, 6 Wall. 475; *Nightingale v. Burrell*, 15 Pick. 104; *Terry v. Briggs*, 12 Metc. 17; *Hall v. Priest*, 6 Gray, 18; *Manderson v. Lukens*, 23 Pa. St. 31. In *Purefoy v. Rogers*, the rule was stated thus: "Where a contingency is limited to depend upon an estate of freehold, which is capable of supporting a remainder, it shall never be construed to be an executory devise, but a contingent remainder only." *Goodright v. Cornish*, 4 Mod. 258; *Reeve v. Long*, Carth. 310; *Doe v. Scarborough*, 3 Ad. & El. 2, 897; *Gore v. Gore*, 2 P. Wms. 28; *Harris v. Barnes*, 4 Burr. 2157.

³ See *ante*, sects. 396, 398, 418.

vested or contingent, a subsequent limitation, which is made to defeat the preceding estate after it has vested, is an executory devise and not a remainder. But the fact that there is a preceding limitation of the fee will not necessarily make the subsequent limitation an executory devise. If the subsequent limitation defeats and takes the place of the preceding limitation upon the breach of a condition, subsequent to the vesting of the first estate, the second limitation is an executory devise.¹ But if the subsequent limitation is merely an alternate devise which depends upon a condition precedent to the first, and which must vest, if at all, before the first, then it is a contingent remainder and not an executory devise. It is an alternate remainder, or a remainder with a double aspect.²

§ 538. **Same — Limitation after an estate tail.** — A remainder can be limited after an estate tail, which is to take effect upon the failure of issue.³ But it is often difficult in a devise to one and his heirs, and a limitation over in case of a failure of issue, to discover whether it was the intention of the testator to give to the first taker an estate tail, or only that his estate of inheritance should cease when there should be a failure of issue, the failure of issue being the contingency, when the limitation over should take effect. If it was his intention to create an estate tail, the

¹ *Gulliver v. Wicketts*, 1 Wils. 105; *Meadows v. Parry*, 1 Ves. & B. 124; *Fonnereau v. Fonnereau*, 3 Atk. 315; *Doe v. Selby*, 2 B. & C. 930; *Nightingale v. Burrell*, 15 Pick. 104; *Doe v. Beauclerk*, 11 East, 657; *Carr v. Erroll*, 6 East, 58; *Doe v. Heneage*, 4 T. R. 13; *Nicholl v. Nicholl*, 2 W. Bl. 1159.

² *Luddington v. Kime*, 1 Ld. Raym. 203; *Goodwright v. Dunham*, 1 Dougl. 265; *Doe v. Selby*, 2 B. & C. 926; *Doe v. Challis*, 2 Eng. L. Eq. 215; *Dunwoodie v. Reed*, 3 Serg. & R. 452; *Taylor v. Taylor*, 63 Pa. St. 481; 3 Am. Rep. 565. See *ante*, sect. 415.

³ 2 Washb. on Real Prop. 690; *Wiscot's Case*, 2 Rep. 61; *Roe v. Baldwere*, 5 T. R. 110; *Page v. Hayward*, 2 Salk. 570; *Wilkes v. Lion*, 2 Cow. 392; *Hall v. Priest*, 6 Gray, 18; *Poole v. Morris*, 29 Ga. 374. See *ante*, sect. 398.

limitation over is a remainder;¹ otherwise, an executory devise.²

¹ *Parker v. Parker*, 5 Metc. 134; *Nightingale v. Burrill*, 15 Pick. 104; *Allen v. Trustees*, 102 Mass. 263; *Hannau v. Osborn*, 4 Paige Ch. 336; *Conklin v. Conklin*, 3 Sandf. Ch. 64; *Dolfe v. Van Nostrand*, 2 N. Y. 436; *Ferris v. Gibson*, 4 Edw. Ch. 707; *Morehouse v. Cotheal*, 21 N. J. L. 480; *Goddard v. Goddard*, 10 Pa. St. 79; *Taylor v. Taylor*, 63 Pa. St. 481; 3 Am. Rep. 565; *Hill v. Hill*, 74 Pa. St. 173; 15 Am. Rep. 545. And at common law the limitation over upon failure of issue is always presumed to be a remainder after an estate tail, unless there is something in the context to the contrary, in conformity with the general rule requiring a future limitation to be construed as a remainder, if it can take effect as such. *Hawley v. Northampton*, 8 Mass. 3; *Parker v. Parker*, 5 Metc. 134; *Vedder v. Evertson*, 3 Paige, 281; *Wolfe v. Van Nostrand*, 2 N. Y. 436; *Stehman v. Stehman*, 1 Watts, 466; *Wall v. Maguire*, 21 Pa. St. 248; *Manderson v. Lukens*, 23 Pa. St. 31. But it must be remembered that estates tail have now been abolished in very many of the States; in some they are converted into fees simple, while in others the first taker has an estate for life, and the rest of the estate constitutes a contingent remainder in fee in the first taker's issue and their descendants. See *ante*, sect. 52. In both classes of States the doctrine that a remainder can be limited after a fee has become obsolete and impossible through the inability to create an estate tail. If there is, in one of these States, a devise to A. and the heirs of his body, with a limitation over upon failure of issue, the limitation over can only take effect as an executory devise, and will be a good or a void limitation, according as the testator is construed to intend a definite or indefinite failure of issue. See *post*, sect. 542.

² *Jackson v. Chew*, 12 Wheat. 153; *Jackson v. Elmendorf*, 3 Wend. 222; *Jackson v. Thompson*, 6 Cow. 178; *Jackson v. Staats*, 11 Johns. 337; *Pond v. Bergh*, 10 Paige, 140; *Guernsey v. Guernsey*, 36 N. H. 267; *Lion v. Burtiss*, 20 Johns. 483; *Richardson v. Noyes*, 2 Mass. 56; *Couch v. Gorham*, 1 Conn. 36; *Rapp v. Rapp*, 6 Pa. St. 45; *Mifflin v. Neal*, 6 Serg. & R. 460; *Nicholson v. Bettie*, 57 Pa. St. 384; *Morris v. Potter*, 10 R. I. 58; *Sutherland v. Cox*, 3 Dev. L. 394; *Garland v. Watts*, 4 Ired. Eq. 287; *Burfoot v. Burfoot*, 2 Leigh, 119; *Hart v. Thompson*, 3 B. Mon. 482; *Allender's Lessee v. Sussan*, 33 Md. 11; 3 Am. 171. Generally the construction depends upon the express words of the testator used in limiting the estate. But if they leave the character of the limitation doubtful, then resort must be had to the *context*; and if it appears from the context that it was the intention of the testator to create an executory devise, it will be held to be one, notwithstanding the ordinary presumption that such a limitation is a remainder. The presumption prevails only when it is absolutely impossible to ascertain the intention of the testator. *Person v. Dodge*, 23 Pick. 287; *Hall v. Chaffee*, 14 N. H. 215; *Hill v. Hill*, 4 Barb. 419; *Den v. Allaire*, 20 N. J. L. 6; *Armstrong v. Kent*, 21 N. J. L. 509; *Kennedy v. Kennedy*, 29 N. J. L. 185; *Scott v. Price*, 2 Serg. & R. 59; *Berg v. Anderson*, 72 Pa. St. 87; *Hill v. Hill*, 74 Pa. St. 173; 15 Am. Rep. 545; *Hilleary v.*

§ 539. **Same — Where first limitation lapses.** — The will goes into effect at the testator's death, and is construed according to the circumstances surrounding the testator at that time. No change of circumstances can affect the will which occurs afterwards. If, therefore, there be a sufficient particular estate to support the future contingent limitation at the death of the testator, it will take effect as a contingent remainder, and any subsequent lapse of the particular estate, before the future estate vested, would defeat such contingent estate. Once a remainder always a remainder. But if the particular estate is void or lapses because of a change of circumstances, occurring between the execution of the will and the testator's death, the devise will be construed as if there had been no preceding limitation, and the contingent limitation will be supported as an executory devise.¹

§ 540. **Same — Limitations after an executory devise.** — If there are successive limitations which take effect after an executory devise, they are all executory devises until the

Hilleary, 26 Md. 275; Rucker v. Lambden, 12 Smed. & M. 231; Jones v. Miller, 13 Ind. 337; Booker v. Booker, 5 Humph. 505; Smith v. Hunter, 23 Ind. 580. So also where a statute makes all limitations over upon failure of issue refer to a *definite* failure of issue, the limitation will be construed ordinarily to be an executory devise. Pinkham v. Blair, 57 N. H. 226; Macombe v. Miller, 26 Wend. 229; Wilson v. Wilson, 32 Barb. 328; McKee v. Means, 34 Ala. 349. See *post*, sect. 542, for a discussion of the question, when a "failure of issue" will be construed to mean a *definite* failure of issue, and what would be the effect upon the executory devise of the construction that it means an *indefinite* failure of issue.

¹ 2 Washb. on Real Prop. 691; 6 Cruise Dig. 422; Fearne Cont. Rem. 625, 626; Purefoy v. Rogers, 2 Saund. 388; Doe v. Howell, 10 B. & C. 191; Avelyn v. Ward, 1 Ves. sr. 420; Hopkins v. Hopkins, 1 Atk. 581; Mogg v. Mogg, 1 Meriv. 703; Bullock v. Bennett, 31 Eng. L. & Eq. 463; Doe d. Scott v. Roach, 5 M. & Sel. 48; Mathis v. Hammond, 6 Rich. Eq. 121. So, also, if the prior devise should fail by a refusal of the devisee to accept it, the future limitation, which would otherwise be a contingent remainder, will take effect as an executory devise. Yeaton v. Roberts, 28 N. H. 459; Eaton v. Straw, 18 N. H. 320; Goddard v. Goddard, 10 Pa. St. 79; Thompson v. Hoop, 6 Ohio St. 480.

first limitation takes effect in possession. But upon the happening of that event they will become and be construed as remainders if they are capable of sustaining that relation to the preceding limitation. Such would be the case, if the devise was to A. for life six months after the testator's death, remainder to B. in fee. During the six months both limitations would have the character of executory devises in respect to the rights of the testator's heirs, but B.'s estate would be a remainder in respect to A.¹ And in limitations of this character the first executory devise may be contingent, while the second is certain and vested. Until the first is vested the second is vested, subject to be opened and to let in the first, when it vests.² And if the first limitation lapses the second takes effect in possession as an executory devise, as if there had been no preceding limitations.³

§ 541. **Indestructibility of executory devises.**—Since executory devises are not dependent for support upon any preceding estate, it cannot be altered or defeated by any act of the first taker, unless such act is made by the terms of the will the occasion of defeating the devise. Feoffment by the first taker will not otherwise destroy the executory devise, as it would a contingent remainder.⁴ In England an exception seems to have been made in the case of an executory devise taking effect in derogation of an estate tail, where a recovery suffered by the tenant in tail would also

¹ 2 Washb. on Real Prop. 691, 692; 2 Prest. Abst. 173; *Purefroy v. Rogers*, 2 Wm. Saund. 388, note; *Brownsword v. Edwards*, 2 Ves. sr. 247; *Hopkins v. Hopkins*, 1 Atk. 581; *Doe v. Howell*, 10 B. & C. 191; *Fearne Cont. Rem.* 503; *Pay's Case*, Cro. Eliz. 878.

² 2 Washb. on Real Prop. 693; *Fearne Cont. Rem.* 506.

³ See *ante*, sect. 539.

⁴ 2 Washb. 698, 699; 2 Bla. Com. 173; *Fearne Cont. Rem.* 418; *Prop'rs Brattle Sq. Church v. Grant*, 3 Gray, 146; *Downing v. Wherrin*, 19 N. H. 9; *Andrews v. Roye*, 12 Rich. 544; *McRee's Adm'rs v. Means*, 34 Ala. 349; *Smith v. Hunter*, 23 Ind. 582; *Miller v. Chittenden*, 4 Iowa, 252.

defeat the devise.¹ As recoveries do not obtain in this country this exception is of no importance to an American lawyer.

§ 542. **Limitation upon failure of issue.**—In determining whether a future limitation vesting upon a failure of issue is a remainder or an executory devise, two points are to be considered. The first is whether the failure relates to the issue of the first taker, or to that of a stranger. In the first instance the second limitation, in the absence of an express contrary intention, will so limit the prior devise as to convert it into an estate tail, thereby making the second limitation a remainder after an estate tail. If it be the issue of a stranger it will not reduce the prior devise to an estate tail, and hence the second limitation can only take effect as an executory devise.² The second point is whether the failure means an indefinite failure of issue, *i.e.*, that the second limitation is to take effect at any future time, when there shall be a failure of heirs in the direct line of descent from the first taker, or whether it refers to a failure of issue within any particular period, as at the death of the first taker. The common-law rule was, and it still obtains in the absence of statutory changes, that where failure of issue was made the contingency upon which the second limitation was to vest, without any express reference to the kind of issue meant, or where the kind of issue could not be determined by a reference to the context, it was an indefinite failure of issue,³ which, as will be shown in a subsequent

¹ 2 Washb. on Real Prop. 699; 2 Prest. Abst. 120; Fearne Cont. Rem. 423, 424. See *ante*, sects. 49, 398.

² Grumble v. Jones, 11 Mod. 207; Badger v. Lloyd, 1 Ld. Raym. 526; *s. c.*, 1 Salk. 233; Att'y-Gen. v. Gill, 2 P. Wms. 369; Preston v. Funnell, Willes, 165; Sears v. Russell, 8 Gray, 93; Terry v. Briggs, 12 Metc. 22. But see *ante*, sect. 538, notes.

³ Cole v. Goble, 13 C. B. 445; Pleydell v. Pleydell, 1 P. Wms. 748; Williamson v. Daniel, 12 Wheat. 568; Riggs v. Sally, 15 Me. 408; Burroughs v. Foster, 6 R. I. 534; Brattleboro' v. Mead, 43 Vt. 556; Nightingale v. Burrill,

paragraph, would make the second limitation good, if it could take effect as a remainder after an estate tail, as above explained,¹ and void, if it could only take effect as an executory devise.² The tendency in this country at the present time is to change this rule of construction, by statute or by judicial legislation, wherever possible, so that a failure of issue would mean a failure upon the death of the first taker.³

15 Pick. 104; *Jackson v. Billinger*, 18 Johns. 368; *Miller v. Macomb*, 26 Wend. 229; *Moore v. Rake*, 26 N. J. L. 574; *Den v. Small*, 20 N. J. L. 151; *Kleppner v. Laverty*, 70 Pa. St. 70; *Allen v. Henderson*, 49 Pa. St. 333; *Ingersoll's Appeal*, 86 Pa. St. 240; *Newton v. Griffith*, 1 Har. & G. 111; *Hallett v. Pope*, 3 Har. 542; *Torrance v. Torrance*, 4 Md. 11; *Tinsley v. Jones*, 13 Gratt. 289; *Rice v. Sadderwhit*, 1 Dev. & B. Eq. 69; *Mazyeh v. Vanderhost*, 1 Bailey Eq. 48; *Cox v. Buck*, 5 Rich. 604; *Lillibridge v. Ross*, 31 Ga. 730; *Hamner v. Hamner*, 3 Head, 398; *Voris v. Sloan*, 68 Ill. 588; *Chism v. Williams*, 29 Mo. 288. A more liberal rule prevailed in respect to personal property and chattel interests in real property, and very slight evidence was sufficient to make the "failure of issue" mean a definite failure. *Allender v. Sussan*, 33 Md. 11; 3 Am. Rep. 171; *Biscoe v. Biscoe*, 6 Gill & J. 232; *Davidge v. Chaney*, 4 Har. & McH. 393; *Morehouse v. Cotheal*, 22 N. J. L. 430; *Cadworth v. Thompson*, 3 Desau. 256. In *Brummet v. Barber*, 2 Hill (S. C.) 543, Judge O'Neill says: "Although there is *no such positive and substantial legal distinction*, yet there is no doubt that the court is not so strictly bound down to an artificial rule of construction in personal as in real estate, and that in the former they will lay hold of words to tie up the generality of the expression 'dying without issue' and confine it to dying without issue, living at the time of the first taker's death, which would not have that effect in the latter." But before declaring the term "failure of issue," or "dying without issue," to mean an indefinite failure of issue, the whole will must be scanned, in order to discover the intention of the testator. The common law, however, required clear proof of a contrary intention to overcome the ordinary presumption of law in favor of its being an indefinite failure of issue. See cases cited, *supra*. In *Chism v. Williams*, 29 Mo. 288, Judge Napton says: "The question is, conceding that the words 'dying without issue' mean an indefinite failure of issue, are there other words which, *of themselves, and in despite of this general manifestation of intention* to keep the property indefinitely in the descendants of the first taker, point *incontestably and unequivocally* to the death of the first taker as the period contemplated by the testator when the limitation over should take effect."

¹ See *ante*, sect. 538, and notes.

² See *post*, sect. 544.

³ Such is the statutory rule in Alabama, California, Georgia, Kentucky, Maryland, Michigan, Minnesota, Mississippi, Missouri, New Jersey, New

And it may be stated as a general proposition that in the other States the courts are receding from their former strict construction in favor of its being an indefinite failure of issue, so that, whenever it is possible to gather together sufficient circumstances to establish the intention to limit upon a definite, instead of an indefinite, failure of issue, the courts will readily do so, sometimes availing themselves of very slight circumstances in order to reach the conclusion which is most favorable to the validity of the devise. For example, in a devise to Thomas and his heirs, and if he die without issue, living William, then to William, the devise was held to refer to a failure of issue during the life of William.¹ So, also, where the contingency was that the person should die, leaving no issue *behind* him, or where the second limitation was only a life estate, it was held to mean a definite failure of issue.²

York, North Carolina, South Carolina, Tennessee and Virginia. 2 Jar. on Wills (5th Am. ed.), 340; Worrill v. Wright, 25 Ga. 659; Armstrong v. Armstrong, 14 B. Mon. 333; Powell v. Brandon, 24 Miss. 343; Faust v. Birner, 30 Mo. 414; Condict v. King, 13 N. J. 375.

¹ Pells v. Brown, Cro. Jac. 590.

² Porter v. Bradley, 3 T. R. 143; Trafford v. Boehm, 3 Atk. 440; Forth v. Chapman, 1 P. Wms. 663; Ide v. Ide, 5 Mass. 500; Griswold v. Greer, 18 Ga. 545. Where the limitation over is to others, or to the surviving children or issue of the first taker, a *definite* failure of issue is generally presumed to be intended. Jackson v. Chew, 12 Wheat. 153; Brightman v. Brightman, 100 Mass. 238; Clark v. Terry, 34 Conn. 176; Lion v. Burtiss, 20 Johns. 483; Cutter v. Doughty, 23 Wend. 513; Bedford's Appeal, 40 Pa. St. 18; Den v. Allaire, 20 N. J. L. 15; Ingersoll's Appeal, 86 Pa. St. 240; Threadgill v. Ingram, 1 Fed. L. 577; McCorkle v. Black, 7 Rich. L. 407; Russ v. Russ, 9 Fla. 105; Deboe v. Lowen, 8 B. Mon. 616; Williams v. Turner, 10 Yerg. 289; Lambdin v. Lambdin, 12 Smed. & M. 31. The tendency is to construe "die *without leaving issue*," or "*leaving no issue*," as meaning a definite failure of issue. Maurice v. Maurice, 43 N. Y. 303; Eaton v. Straw, 18 N. H. 321; Fairchild v. Crane, 13 N. J. Eq. 105; Hill v. Hill, 74 Pa. St. 173; 15 Am. Rep. 545; Nicholson v. Bettie, 57 Pa. St. 386; Clapp v. Fogleman, 1 Dev. & B. Eq. 466; Carr v. Jeannett, 2 McCord, 66; Perry v. Logan, 5 Rich. Eq. 202; Harris v. Smith, 16 Ga. 545; Daniel v. Thompson, 14 B. Mon. 662; Edwards v. Bibb, 43 Ala. 666. *Contra*, Malcolm v. Malcolm, 3 Cush. 472; Haldeman v. Haldeman, 40 Pa. St. 29; Patterson v. Ellis, 11 Wend. 289; Tongue v. Nutwell, 13 Md. 415. So,

§ 543. **Same — In deeds.** — The rules of construction, as stated above, although in the main referable to springing and shifting uses created by deed, must in their application to these limitations receive the further restriction that there are sufficient technical words of limitation present to convert the prior limitation into a fee tail. If the first limitation is expressly an estate in fee simple, the second limitation over upon failure of issue of the first taker would not convert the former into an estate tail, although the same limitation in a will would have had that effect. Thus a conveyance to A. and his heirs, and if he should die without issue, then over, A. would take a fee upon condition, in-

also, was a definite failure of issue held to be intended by the clause dying "without lawful heirs," or "without lawful heirs of his body." *Abbott v. Essex Co.*, 18 How. 202; *Hudson v. Wadsworth*, 8 Conn. 359; *Seibert v. Butz*, 9 Watts, 490; *Fahoney v. Holsinger*, 65 Pa. St. 388; *Berg v. Anderson*, 72 Pa. St. 87; *Timberlake v. Graves*, 6 Munf. 174; *Keating v. Reynolds*, 1 Bay, 80; *Jones v. Miller*, 13 Ind. 337. And see generally *Theol. Seminary v. Kellogg*, 16 N. Y. 84; *DuBois v. Ray*, 35 N. Y. 162; *Diehl v. King*, 6 Serg. & R. 32; *Downing v. Wherrin*, 19 N. H. 9; *Hall v. Chaffee*, 14 N. H. 215; *Simmonds v. Simmonds*, 112 Mass. 157; *Wilson v. Wilson*, 32 Barb. 328; *Garland v. Watt*, 4 Ired. L. 287; *Jones v. Sothoron*, 10 Gill & J. 187; *Bullock v. Seymour* 33 Conn. 290; *Badger v. Hardin*, 6 Rich. L. 149; *Forman v. Troup*, 30 Ga. 496; *Moore v. Howe*, 4 B. Mon. 200; *Brashear v. Macey*, 3 J. J. Marsh. 91; *Parish v. Ferris*, 6 Ohio St. 563; *Niles v. Gray*, 12 Ohio St. 320. On the other hand, a devise to sons, but if they die without issue, then "to my surviving children," has been held to mean an indefinite failure of issue. See *Lapsley v. Lapsley*, 9 Pa. St. 130; *Clark v. Baker*, 3 Serg. & R. 470; *Doyle v. Mullady*, 33 Pa. St. 264; *Den v. Cook*, 7 N. J. L. 41; *Holcombe v. Lake*, 25 N. J. L. 605; *Bells v. Gillespie*, 5 Rand. 273; *Stevenson v. Jacobs*, 3 Murph. 558. So, also, to A. and B., their heirs and assigns, but if they die without issue, then over. *Sillibridge v. Adie*, 1 Mason, 224. The truth is, the old rule, by which these questions were determined, was really arbitrary, and in most cases directly contrary to the real intention of the testator, although the courts professed to follow his intention as it appeared upon the will. For example, in the case, cited above, of a devise to two or more sons, and if they should die without issue, "then to my surviving children," an indefinite failure of issue was held to be intended; whereas the most natural and rational construction was, that the testator intended *his* surviving children to take, in the event or the death of one of them without issue. Those States which have by statute cut loose from these common-law rules have acted wisely.

stead of an estate tail, as he would have done if the limitation had been by devise.¹ On the other hand, the question as to the definite or indefinite failure of issue is more liberally determined when it refers to shifting uses than in the case of executory devises, because of the common disinclination of the courts to construe the will as to disinherit the heir at law.² The necessity of determining what is the exact effect of a limitation upon failure of issue lies in the

§ 544. **Doctrine of perpetuity.** — We have seen that the common-law restrictions, as to the kinds and classes of estates which might be carved out of a fee, do not apply to executory devises or springing and shifting uses. As a consequence, if there was no restraint as to the time when an executory devise or future use should vest in possession, lands might be so conveyed to uses, or by way of executory devises, that the power of alienation might be indefinitely suspended, thereby preventing that change of ownership in lands which has ever been considered so salutary to the welfare of the country. The courts, therefore, at a very early day, laid down the rule that executory interests, whether by way of use or devise, must, in order to be valid limitations, take effect in possession within a life or lives in being, and twenty-one years thereafter.³ To this was added the nine

¹ *Coltman v. Senhouse*, Pollexf. 536; *Daviess v. Speed*, 2 Salk. 675; *Abraham v. Twigg*, Cro. Eliz. 478; *Hall v. Priest*, 6 Gray, 18; 2 Washb. on Real Prop. 711, 712. It is apparent, from the small number of cases cited, that this question very rarely arises in respect to springing and shifting uses.

² 2 Washb. on Real Prop. 711; *Forth v. Chapman*, 1 P. Wms. 663; *Hall v. Priest*, 6 Gray, 18.

³ 2 Washb. on Real Prop. 701, 702. This limit of the time within which an executory interest must take effect in possession to be valid was, no doubt, suggested by the fact that an estate tail, according to the English law, could not be made inalienable for any longer period. For example, A. would settle his lands to himself for life, remainder to his eldest son in tail male, remainder to his second son in tail male, remainders over. Since an estate tail could be barred by common recovery, A., in settling his estate in this manner, could only make the lands inalienable until his eldest son was born and became of

months required by nature for the gestation of a child *en ventre sa mere*, when posthumous children were declared capable of taking future estates.¹ If the executory interest could, by any possibility, take effect beyond that period, it was void, even though it afterwards did, as a matter of fact, take effect within the period. It must be absolutely certain to vest within that period, if at all, in order to be valid.² If the future limitations be void for this reason, it leaves the prior limitation, if any, free from the condition, making what was a conditional estate an absolute one.³ A limitation, void because it offends the doctrine of perpetuity, will be void altogether, and cannot be held, under the *cy pres* rule of construction, to be good as to that part which keeps within the period of perpetuity, and void only as to the excess.⁴ But if the limitation is dependent upon one of two events, one of which must happen within the period of

age. It would, therefore, at the farthest, remain inalienable during his life and twenty-one years thereafter, viz.: a life or lives in being and twenty-one years thereafter. This doctrine as to the probable origin of the doctrine of perpetuity is supported by Mr. Washburn (2 Washb. on Real Prop. 702); and it might be inferred from the discussion by Mr. Williams of estates tail, marriage settlements, and the doctrine of perpetuity in the same connection (see Williams on Real Prop. 50, 51), that he also had in mind the idea of their common origin.

¹ 2 Washb. on Real Prop. 702, 703; Williams on Real Prop. 319.

² *Purefoy v. Rogers*, 2 Saund. 388; *Nottingham v. Jennings*, 1 Salk. 233; *Duke of Norfolk's Case*, 2 Chanc. Cas. 1; *Beard v. Westcott*, 5 B. & Ald. 801; *Prop'rs Battle Sq. Church v. Grant*, 3 Gray, 146; *Sears v. Russell*, 8 Gray, 100; *Jackson v. Phillips*, 14 Allen, 572; *Wood v. Griffin*, 46 N. H. 234; *Andrews v. Jackson*, 16 Johns. 399; *Donahue v. McNichols*, 61 Pa. St. 78; *Andrews v. Royce*, 12 Rich. 542; *St. Amour v. Rivard*, 2 Mich. 294; *Mandlebaum v. McDonnell*, 29 Mich. 78; 18 Am. Rep. 61.

³ *Tud. Ld. Cas.* 361; *Nottingham v. Jennings*, 1 Salk. 233; *Beard v. Westcott*, 5 B. & Ald. 801; *Jackson v. Noble*, 2 Kee, 590; *Gatenby v. Morgan*, 1 Q. B. D. 685; *Prop'rs. Brattle Sq. Church v. Grant*, 3 Gray, 142; *Sears v. Russell*, 8 Gray, 100; *Drummond v. Drummond*, 26 N. J. Eq., 234; *Philadelphia v. Girard*, 45 Pa. St. 27; *Shephard v. Shephard*, 2 Rich. Eq. 142.

⁴ *Leak v. Robinson*, 2 Meriv. 362; *Fox v. Porter*, 6 Sim. 485; *Evers v. Challis*, 7 H. L. Cas. 555; *Jackson v. Phillips*, 14 Allen, 572. Still there is a class of cases, in which parts of a testator's will will be carried into effect, while other parts, which are void on account of remoteness, will be discarded. But this

perpetuity, while the other is remote, it will be a good limitation, except that it will vest only upon the happening of the event which is not remote, while the other condition is void and has no effect upon the devise.¹ The greatest difficulty is experienced in applying this rule against perpetuity to limitations upon failure of issue. If the limitation cannot be construed as a remainder after an estate tail, or as an executory devise to take effect upon a definite failure of issue, it would be void, since an executory devise after an indefinite failure of issue cannot always take effect within the period of perpetuity.² Since estates tail cannot be created out of a term of years, the courts are inclined to construe a failure of issue in the devise of a term to mean a definite failure of issue, referable to the death of the ancestor, upon the failure of whose issue the future limitation is to vest. Otherwise such future limitation could never take effect, since it would always offend the rule against perpetuities.³ It is also difficult at times to determine whether in the case of an executory devise to a class, when some cannot take because too remote, the whole devise is void as

will be done, only when substantial justice will be done to all parties concerned, and when the paramount or general intention of the testator would then be carried into effect. See *Arnold v. Congreve*, 1 Russ. & Myl. 279; *Carver v. Bowles*, 2 Russ. & Myl. 306; *Church v. Kemble*, 5 Sim. 522.

¹ *Fowler v. Depan*, 26 Barb. 224; *Schettler v. Smith*, 41 N. Y. 328; *Armstrong v. Armstrong*, 14 B. Mon. 333; *Burrill v. Boardman*, 43 N. Y. 254.

² *Forth v. Chapman*, 1 P. Wms. 663; *Doe v. Ewart*, 7 A. & E. 636; *Terry v. Briggs*, 12 Metc. 22; *Hall v. Priest*, 6 Gray, 18; *Anderson v. Jackson*, 16 Johns. 382; *Dallam v. Dallam*, 7 Har. & J. 220; *Hall v. Chaffee*, 14 N. H. 221; *Carry v. Sims*, 11 Rich. 490; *Black v. McAuley*, 5 Jones 375; *Kay v. Scates*, 37 Pa. St. 39; *Bramlet v. Bates*, 1 Sneed, 554; *Moore v. Howe*, 4 B. Mon. 199; *Gray v. Bridgeforth*, 33 Miss. 312. As to when such a limitation would be a remainder after an estate tail, instead of an executory devise after a fee, see *ante* sect. 538. As to when a definite, or an indefinite failure of issue is intended, see *ante* sects. 542, 543.

³ *Forth v. Chapman*, 1 P. Wms. 663; *Hall v. Priest*, 6 Gray, 18; *Allender's Lessee v. Sussan*, 33 Md. 11; 3 Am. Rep. 171; *Morehouse v. Cotheal*, 22 N. J. L. 430; *Biscoe v. Biscoe*, 6 Gill & J. 232; *Brummet v. Barber*, 2 Hill; *s. c.*, 543; *Moore v. Howe*, 4 B. Mon. 199.

against perpetuity, or only that part which offends. The determination of the question depends upon the ability to separate the good from the bad, and at the same time preserve the intention of the testator. If this can be done, and the parties who cannot take are not thereby prejudiced, then only that part of the devise will be void which is too remote, while the devise will be upheld and carried out in favor of those who can take. If the partial enforcement of the devise will work an injury to those who are excluded, or confer upon the fortunate ones benefits, not intended by the testator, the whole devise will then be void.¹ In this country the common-law rule of perpetuity, that future limitations must vest within a life or lives in being and twenty-one years thereafter, still generally prevails, although in some of the States the period has been shortened by statute. The most important change was made in New York, where the period was limited to two lives in being.²

§ 545. **Rule against accumulation of profits.**—It is very often desirable that testators should have the right to direct that the profits of their estates should be allowed to accumulate for a certain time before being distributed among the persons designated in the will. At common law there was no restriction as to the time, within which the profits may be directed to accumulate, except the rule of perpetuity. As long as the accumulation was kept within the period of perpetuity it was a valid limitation. This is the general rule of law in this country at the present day,³ but in Eng-

¹ *James v. Wynford*, 1 Smale & G. 40, *Griffith v. Pownall*, 13 Sim. 393; *Cattlin v. Brown*, 11 Hall, 372; *Webster v. Boddington*, 26 Beav. 128; *Evere v. Challis*, 7 H. L. Cas. 545; *Lowry v. Muldrow*, 8 Rich. Eq. 241. See 2 Washb. Real Prop. 727-730.

² 1 Rev. Stat. N. Y. 723, sect. 15; *Jennings v. Jennings*, 7 N. Y. 547; *Levy v. Levy*, 33 N. Y. 129; *Manice v. Manice*, 43 N. Y. 303.

³ 2 Washb. on Real Prop. 730. In New York and Pennsylvania statutes have been passed, similar in their provisions to the English statute mentioned in the text. 1 Rev. Stat. N. Y. 726, sect. 37; *Manice v. Manice*, 43 N. Y. 305; *Pard. Dig.* (Pa. St. Laws) 853.

gland, and in some of the States, such accumulations are prohibited for a longer period than the life of the grantor and twenty-one years thereafter, or the minority of the person or persons who are to take.¹

§ 546. **Executory devises of chattel interests.** — At common law a remainder could not be limited in a chattel interest after a prior limitation for life, or for any indefinite period which would be a freehold estate, if carved out of a fee. Such limitations would be void as common-law estates.² Nor can an estate tail be created out of a term, the statute *de donis* referring only to tenements, estates of which tenure can be predicated. A devise of a chattel interest to one and the heirs of his body would be the devise of an absolute estate.³ But future limitations were at an early day permitted to be created in chattel interests to take effect as executory devises, and it matters not whether there is or is

¹ Statute 39, 40 Geo. III. ch. 98; 2 Washb. on Real Prop. 731; Williams on Real Prop. 320. This statute was passed in consequence of the foolish and vain ambition of a man, named Thelluson, to make the later generations of his family wealthy and powerful, by providing in his will for the accumulation of the profits during the lives of his then existing heirs. If it had been carried out, the estate would have amounted to £10,000,000, and it was then to be distributed among two or three persons. The will attracted widespread attention, and, it being thought dangerous to permit the accumulation of such vast wealth in the hands of private persons, as well as cruel and unjust to the immediate heirs, an attempt was made to break the will. See *Thelluson v. Woodford*, 1 B. & P. N. R. 396; *s. c.*, 4 Ves. 227. But the court declared the limitation valid, since it did not break the rule against perpetuities. The will provided for the accumulation of the profits of the estate during the lives of all his children, grandchildren and great-grandchildren living at his death, and should, at the death of the last survivor, be divided up among certain descendants who would then be in being. It will be apparent that the testator kept within the rule against perpetuity.

² 2 Washb. on Real Prop. 722; *Fearne Cont. Rem.* 401; *Tissen v. Tissen*, 1 P. Wms. 500; *Manning's Case*, 8 Rep. 95; *Smith v. Bell*, 6 Pet. 68; *Merrill v. Emery*, 10 Pick. 507; *Gillespie v. Miller*, 5 Johns. ch. 21; *Cooper v. Cooper*, 1 Brev. 355.

³ 2 Washb. on Real Prop. 723; *Fearne Cont. Rem.* 461, 463; *Lovies' Case*, 10 Rep. 87; *Doe v. Lyde*, 1 T. R. 593, *Powell v. Glenn*, 21 Ala. 458.

not a preceding limitation, or whether the second limitation takes effect in derogation of the prior limitation. In each case the future limitation is construed as an executory devise; and the rules here laid down for the government of the other two classes of executory devises are in the main applicable to these.¹ The only restriction upon the power to create a future estate in a chattel lies in the nature of the chattel itself. If it is in its nature capable of sustaining a present and a future enjoyment, a future limitation will be good. But if the present enjoyment of the chattel involves a consumption of the thing itself, then of necessity any future limitation would be void.²

¹ *Tissen v. Tissen*, 1 P. Wms. 500; *Manning's Case*, 8 Rep. 95; *Upwell v. Halsey*, 1 P. Wms. 651; *Smith v. Bell*, 6 Pet. 68; *Merrill v. Emery*, 10 Pick. 507; *Gillespie v. Miller*, 5 Johns. Ch. 21; *Moffatt v. Strong*, 10 Johns. 12; *Keene's Appeal*, 64 Pa. St. 273; *Maulding v. Scott*, 13 Ark. 88; 2 Prest. Abst. 4; *Fearne Cont. Rem.* 402; 2 Bla. Com. 174; 2 Washb. on Real Prop. 724.

² *Att'y-Gen. v. Hall*, Fitzg. 314; *Bull v. Kingston*, 1 Meriv. 314; 2 Washb. on Real Prop. 724. But see *Upwell v. Halsey*, 1 P. Wms. 652; *Smith v. Bell*, 6 Pet. 68; *Rubey v. Barnett*, 12 Mo. 1.

CHAPTER XV.

POWERS.

- SECTION** 558. The nature of powers in general.
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§ 558. **The nature of powers in general.** — A power, in the most comprehensive sense in which the word can be used, is an authority conferred upon a person to do a thing. But in its present application it signifies an authority to dispose of property, which is vested either in the person exercising the power, or in some other person. Under this latter signification three distinct classes of powers will be recognized: *First*, statutory powers; *second*, powers of attorney; and *third*, what are generally called powers of appointment, or simply powers. A statutory power is one which is created and vested in a person by legislative enactment. It is an act of the government; it derives its au-

thority from the Legislature, and is subject to the same rules of interpretation and construction as statutes in general.¹ Powers of attorney are authorities conferred by a principal upon an agent to perform certain acts in the manner indicated in the instrument of authority. The exercise of this power is the act of the principal through, or by means of, the agent. It is exercised in the name of the principal, and requires as much formality in execution as if the principal were acting himself. This class of powers, so far as they pertain to the law of real property, will be more specifically explained in subsequent pages.² In both classes of powers just mentioned, statutory powers and powers of attorney, the legal title to the property thus disposed of is conveyed, not by the creation of the power, but by the deed of conveyance made in pursuance of the power. The title remains in the original owner, unaffected by the creation of the power, until its execution. It is divested only when the deed of conveyance is executed and delivered.³

§ 559. **Powers of appointment.**—The third class of powers, enumerated above, is what concerns us at present, viz.: powers of appointment. These powers, which are generally known simply as powers, are modes of disposition of property, which operate under the Statute of Uses or the Statute of Wills. The creation of the power invests in the person to whom it is granted, called the donee, a present indefeasible executory interest in the land. It is a right to convey the land, and cannot be revoked by the donor. The common law knows of no class of powers which will in themselves, by their very creation, convey an interest in

¹ *Baltimore v. Porter*, 18 Md. 284. See also, *Markham v. Porter*, 33 Ga. 508; *In the Matter of Bull*, 45 Barb. 334; *Leak v. Richmond Co.*, 64 N. C. 132.

² See *post*, sects. 805, 806.

³ 2 Washb. on Real Prop. 610; 1 Sugden on Pow. (ed. 1856), 1, 171, 174;
3 Washb. on Real Prop. 277-279.

real property, and thus encumber the title thereof.¹ There are only two modes of creating such a power. One is by way of a use. The power in such a case is "a right to limit a use." (Kent.) In the exercise of the power a use is created, which is immediately executed into a legal estate by the Statute of Uses in the person to whom the use has been limited, and who is called the *appointee*. The estates created by means of these powers are either contingent, springing or shifting uses, according to their relation with the other limitations in the deed or will creating the power, and are governed by the same rules of construction.² An ordinary contingent use vests upon the happening of an uncertain event. In the case of an estate created by means of a power of appointment, the uncertain event is the exercise of the power.³ The other mode of creating this kind of power is by will under the Statute of Wills. The estate so created is an executory devise, deriving its force and effect from the will itself. All powers in a will operate under the Statute of Wills, except where it takes the form of a power to limit a use, and there is a special seisin raised by the will to support the use thus limited. Then it operates under the Statute of Uses, as a contingent or future use.⁴ Whether the power be created by deed or by will, the appointee's estate will have the same characteristics as it would have had if, instead of the power, it had been limited in the instrument creating the power. And in order to determine the rights of the appointee, and the validity and character of the estate appointed to his use, it must be tested by the

¹ Sugden on Pow. (ed. 1856), 4; Co. Lit. 237 a. See *contra*, Chance on Pow. sects. 5-12.

² Co. Lit. 271 b, n. 231; Bac. Law Tr. 314; 1 Spence Eq. Jur. 455; 4 Kent's Com. 334; Williams on Real Prop. 394.

³ Co. Lit. 271 b, Butler's note, 231; Tud. Ld. Cas. 264; Sheph. Touch. 529; Williamson on Real Prop. 294; Rush v. Lewis, 21 Pa. St. 72; Rodgers v. Wallace, 5 Jones L. 182.

⁴ 1 Sugden on Pow. (ed. 1856) 240; Prest. Abst. 347.

relation it would bear to the other limitations of the property, if it had occupied the place of the power in the original instrument. The appointor is merely an instrument employed to limit the estate; the appointee is in by the original instrument, which creates the power.¹ The foregoing explanation of the doctrine of powers is true as to this country generally, with the, perhaps, single exception of New York. In that State all powers, heretofore known as operating under the Statute of Uses and the Statute of Wills, have been abolished, and only certain powers, enumerated in the statute, can now be created. But they have received at the hands of the courts of that State practically the same construction as powers in other States, so that what is subsequently said of powers of appointment is equally applicable to powers in New York, the only difference being that there they operate under the statute of New York, instead of the old English Statutes of Uses and Wills, and are confined to certain objects.²

§ 560. **Kinds of powers.** — Powers of appointment may be conferred upon persons having an interest or estate of some kind in the land, or they may be given to persons who are otherwise altogether strangers to the property. In the latter case they are called *collateral* or *naked* powers; the power is not attached to any present estate, and the donee possesses the mere right to exercise the power.³ In the former case the power is either *appendant* or *in gross*,

¹ 1 Sugden on Pow. (ed. 1856), 171, 242; Co., Lit. 271 b; Butler's note, 231, sect. 3, pl. 4; Gilbert on Uses, 127, n; 4 Kent's Com. 337; 4 Cruise Dig. 220; 2 Washb. Real Prop. 636, 637; Doolittle v. Lewis, 7 Johns. Ch. 45; Bringloe v. Goodson, Bing. N. C. 726; Roach v. Wadham, 6 East, 289; Doe v. Britain, 2 B. & Ald. 93; Mosley v. Mosley, 5 Ves. 256; Bradish v. Gibbs, 3 Johns. Ch. 550.

² N. Y. Rev. Stat., Art. 3, sects. 86-148; Hotchkiss v. Elting, 36 Barb. 38.

³ Tud. Ld. Cas. 286; Williams on Real Prop. 294; 1 Sugden on Pow. 107; 2 Washb. on Real Prop. 639; Bergen v. Bennett, 1 Caines' Cas. 15; Edwards v. Slater, Hard. 416.

according to its relation to the estate, to which it is attached. Any power whose execution creates an estate, which issues partly or wholly out of an estate vested in the donee, is a power *appendant*. Thus, where a tenant for life has the power to make leases in possession, which are to continue until their natural termination independent of the lessor's life estate, it is called a power appendant. The lease granted takes effect immediately in derogation of the tenant's life-estate, and binds the remainder-man, if it does not expire during the continuance of the life estate.¹ Powers *in gross* are those which do not conflict with the estate of the donee, and authorize the limitation of estates, which take effect out of the interest or estate of some one else. Such would be a power given to a life tenant to dispose of the remainder, to raise a jointure for his wife, to make leases commencing at his death. The exercise of these powers cannot by any possibility affect the estates to which they are attached.² Powers are also divided into *general*, and *special* or *particular*. If the donee has the power to appoint to whom he pleases it is a general power; and if he can appoint to only certain particular persons, it is a special or particular power.³ Then again a general power may be for the benefit of the donee, or one in trust for certain beneficiaries.⁴ If the power be to create a new estate, it is called a power of appointment. If it be simply to destroy an estate already vested, it is called a power of revocation. A power of appointment always implies a power of revocation, but as a

¹ Williams on Real Prop. 310; 2 Washb. on Real Prop. 639, 640; Edwards v. Slater, Hard. 416; Bergen v. Bennett, 1 Caines' Cas. 15; Maundrell v. Maundrell, 10 Ves. 246; Wilson v. Troup, 2 Cow. 236.

² 1 Sugden on Pow. 114; 4 Cruise's Dig. 220; Gorin v. Gordon, 38 Miss. 214; Wilson v. Troup, 2 Cow. 236; Tud. Ld. Cas. 293.

³ 2 Washb. on Real Prop. 641; Co. Lit. 271 b, Butler's note, 231, Pl. 4, sect. 3; Williams on Real Prop. 309; Roach v. Wadham, 6 East, 289; Commonwealth v. Williams, 1 Harris, 29.

⁴ Tud. Ld. Cas. 294; Williams on Real Prop. 307, 308; Chance on Pow., sect. 84.

rule an express power of revocation will not raise by implication a power of appointment. A power of appointment cannot be exercised without revoking a previous limitation; by the exercise of the power of revocation, where there is no express power of appointment, the land reverts to the grantor and his heirs.¹

§ 561. **Suspension and destruction of powers.**—All general powers, given for the benefit of the donee, may be released by him to one holding the freehold, whether in possession, remainder, or reversion, and thus destroyed. And this, too, whether the power be appendant, *in gross*, or collateral. For, it being given for the sole benefit of the donee, if he releases it, he will not be allowed thereafter to exercise it in derogation of his own release.² But a special power, or a general power in trust for certain beneficiaries, cannot be extinguished or released by any act of the donee alone. The power in such cases is in the nature of a trust, and the beneficiaries have rights therein which are beyond the power of the donee to destroy.³ And where the exercise of the special power is mandatory, thereby imposing upon the donee a peremptory duty to exercise it; or where the discretion, if any is given to the donee as to its exercise, is to be exerted and employed at some future time, the donee has no power to extinguish or release it, even

¹ 4 Cruise's Dig. 219, 220; Sandf. on Uses, 154; Tud. Ld. Cas. 264; 4 Kent's Com. 415; Wright v. Tallmadge, 15 N. Y. 307.

² Tud. Ld. Cas. 294; Edwards v. Slater, Hard. 416; Chance on Pow., sect. 3115; 1 Sugden on Pow. 112; Williams on Real Prop. 310; Smith v. Death, 5 Mad. 371; Horner v. Swann, Turn & Russ. 430; Albany's Case, 1 Rep. 11, b, 113 a; West v. Bernly, 1 Russ. & M. 431.

³ Co. Lit. 237 a, 265 b; 1 Sugden on Pow. 117; Doe v. Smyth, 6 B. & C. 172; s. c., 9 Dowl. & Ry. 136; Townson v. Tickell, 3 B. & A. 31; Begbie v. Croak, 2 Bing. N. C. 70; Tuick v. Ludborough, 3 Bulstr. 30; Tud. Ld. Cas. 286, 295; Chance on Pow., sect. 3105; Tippet v. Eyres, 5 Mod. 457; Cunynghame v. Thurlow, 1 Russ. & M. 436 n; West v. Barney, 1 Russ. & M. 431; Tainter v. Clark, 13 Metc. 220; Norris v. Thompson, 4 Green L. 307.

though the persons interested in, and to be benefited by its exercise, consent to the release, and join in the deed.¹ But if it is within the discretion of the donee when and whether, if at all, he should execute the power, a joint deed of release by himself and the beneficiaries will extinguish the power.² Where the power is appendant, the conveyance of the entire estate to which the power is annexed will destroy the power. The power can only be exercised in derogation of the estate, and the donee will not be permitted to defeat his own grant by executing the power.³ But if he conveys only a part of his estate, leaving a reversion in him, the exercise of the power will only be suspended or postponed to the estate so granted, and the estate created by the power will vest upon the termination of the prior demise.⁴ The power may be exercised at any time; only the enjoyment of the estate thus created is postponed.⁵ But

¹ 2 Washb. on Real Prop. 643; Chance on Pow., sect. 3121; Williams on Real Prop. 310.

² Brown & Sterritt's Appeal, 27 Pa. St. 62; Allison v. Wilson's Exrs., 18 Serg. & R. 330.

³ Goodright v. Cato, Dougl. 460; Wilson v. Troup, 2 Cow. 195; Noel v. Henry, McClell. & Yo. 302; Bullock v. Thorne, Moore, 615; Anon., Moore, 612; Yelland v. Fielis, Moore, 788; 1 Sugden on Pow. 113-115; Penn v. Peacock, For. 41; Cas. temp. Talb. 43; Webb v. Shaftesbury, 3 Myl. & Kee. 599; Parker v. White, 11 Ves. jr. 209; Walmesley v. Jowett, 23 Eng. L. & E. 353; Jones v. Winwood, 4 Meas. & Wels. 653; Chance on Pow., sects. 3155, 3159; Maundrell v. Maundrell, 10 Ves. 246; Doe v. Britain, 2 B. & Ald. 93; Williams on Real Prop. 310; Tud. Ld. Cas. 260, 290; 4 Cruise's Dig. 157; Bringloe v. Goodson, 4 Bing. N. C. 726.

⁴ Ren v. Bulkeley, Dougl. 292; Tyrrell v. Marsh, 3 Bing. 31; Roper v. Halifax, 8 Taunt. 845; Doe v. Scarborough, 3 Adolp. & Ell. 2; Bringloe v. Goodson, 4 Bing. N. C. 726; 4 Cruise's Dig. 221; Goodright v. Cator, Dougl. 477; Tud. Ld. Cas. 287.

⁵ 1 Sugden on Pow. 114, 115, citing Bringloe v. Goodson, 4 Bing. N. C. 726; Anon., Moore 612; Bullock v. Thorne, Moore, 615; Ren v. Bulkeley, Dougl. 292; Tyrrell v. Marsh, 3 Bing. 31; Davies v. Bush, McClell. & Yo. 58; Wilson v. Troup, 2 Cow. 237; Dalby v. Pullen, 2 Bing. 144; Tud. Ld. Cas. 546; Chance on Pow., sect. 402. *Contra*, Snape v. Turton, Cro. Car. 472; Mordaunt v. Peterborough, 3 Keb. 305. But if the power appendant enables only the creation of estates in possession, as where it is a power to make leases in

no conveyance of the estate of the donee, except by feoffment, will cause an extinguishment of the power *in gross*. As a rule a release is the only mode of extinguishing this kind of power.¹

§ 562. **How powers may be created.** — Powers may be created by deed or by will. They may be incorporated in the same instrument which conveys the property, or they may be indorsed thereon, or even granted by a separate instrument. If the instrument be a deed operating by transmutation of possession, the conveyance of the legal estate is necessary for the creation of the power. In the case of every other instrument of conveyance, there can be a valid grant of a power without a transfer of the legal estate.² No particular words or phrases are required. Any words which clearly indicate the intention of the donor to create a power, and which define its scope with a reasonable degree of certainty, will be sufficient. This rule governs all classes of powers, whether operating under the Statute of Uses or the Statute of Wills.³ Where the deed, which creates the

possession and not *in futuro*, the exercise of the power is altogether suspended. *Bringloe v. Goodson*, 4 Bing. N. C. 726; 1 Sugden on Pow. 116.

¹ *Chance on Pow.*, sect 3172; *Edwards v. Slater*, Hard. 416; *Savile v. Blacket*, 1 P. Wms. 777; 2 Washb. on Real Prop. 643; 1 Sugden on Pow. 112.

² *Outon v. Weeks*, 2 Keb. 809; *Fitz v. Smallbrook*, 1 Keb. 134; 1 Sugden on Pow. 217, 228-231; *Gilbert on Uses*, 46; *Williams on Pers. Prop.* 246; *Co. Lit.* 271 b, III. sect. 5, *Butler's note*; *Powell on Devises*; 1 Sandf. on Uses, 195; *Andrews' Case*, Moore, 107; *Popham v. Bampffield*, 1 Vern. 79; *Thompson v. Lawley*, 2 Bos. & Pul. 311; *Doe v. Finch*, 4 Barn. & Adolph. 283; *Perry v. Phillips*, 1 Ves. jr. 255; *Fearne Cont. Rem.* 128; *Rash v. Lewis*, 21 Pa. St. 72; 3 *Kent's Com.* 319; *Maundrell v. Maundrell*, 10 Ves. 255; 6 *Cruise's Dig.* 490.

³ 2 Washb. on Real Prop. 650; 1 Sugden on Pow. 118; *McCord v. McCord*, 19 Ga. 602; *Choofstall v. Powell*, 1 Grant's Cas. 19; *Bradley v. Wescott*, 13 Ves. 445; *Smith v. Bell*, 6 Pet. 68; *Scott v. Perkins*, 28 Me. 22; *Harris v. Knapp*, 21 Pick. 416; *Porcher v. Daniels*, 12 Rich. Eq. 349; *Brant v. Va. Coal Iron Co.*, 93 U. S. 326; *Jones v. Hurst*, 7 Ired. Eq. 134; *Withington's Appeal*, 32 Pa. St. 419; *Dominick v. Michael*, 4 Sandf. 374; *Gregory v. Congill*, 19 Mo. 415; *Turner v. Timberlake*, 53 Mo. 371; *Putnam School v. Fisher*, 30

power, operates by transmutation of possession, and a seisin is therefore raised by the deed to support the use, which is to be created under the power, the legal estate so conveyed must be as extensive as the use to be thus created. The appointee under the power cannot take a larger estate than that granted to the feoffee to uses. This is only a special application of a general rule governing all classes of uses.¹

§ 563. **Powers distinguished from estates.** — As a consequence of this liberal rule concerning words necessary to create a power, it is very often difficult to determine whether the intention of a testator was to give an estate in the land, or only a naked power. Since technical words are used to create an estate by deed, it rarely happens that doubt will arise in the construction of a power by deed. The question, therefore, possesses importance only in relation to wills.² The intention of the testator will always govern whenever it can be clearly ascertained, even though the literal meaning of the words used would indicate a different conclusion.³ The most numerous cases have arisen under devises, in which executors are directed to sell lands for the purpose of distribution. If the executors are intended to have possession until sale under the power, then it is, of course, a power coupled with an interest, and the estate does not descend

Me. 523; *Mather v. Norton*, 8 Eng. L. & E. 255; *Bateman v. Bateman*, 1 Atk. 421; *Conover v. Hoffman*, 1 Bosw. 214; *Mundy v. Sawter*, 3 Gratt. 518; *Dann v. Keeling*, 2 Dev. 283; *Owen v. Ellis*, 64 Mo. 77. See note 27.

¹ Co. Lit. 271 b, *Butler's* note, 231; *Cleveland v. Hallett*, 6 Cush. 403; *Norceum v. D'Oench*, 17 Mo. 98; *Exeter v. Ociorme*, 1 N. H. 232; 1 Sugden on Pow. 231.

² 4 Kent's Com. 319; *Sharpsteen v. Tillon*, 3 Cow. 651; *Jameson v. Smith*, 4 Bibb. 307; *Gray v. Lynch*, 8 Gill, 403; *Peter v. Beverley*, 10 Pet. 532; *Jackson v. Jansen*, 6 Johns. 73; *Jackson v. Schaubert*, 7 Cow. 187; *Clary v. Frayer*, 8 Gill & J. 403; *Walker v. Quigg*, 6 Watts, 87; *Ladd v. Ladd*, 8 How. 10.

³ *Bloomer v. Waldron*, 3 Hill, 361. See cases cited in preceding note; *Franklin v. Osgood*, 14 Johns. 527; *Brearily v. Brearily*, 1 Stockt. 21; *Digges' Lessee v. Jarman*, 4 Har. & McH. 468; *Jackson v. Ferris*, 15 Johns. 346; *Nelson v. Carrington*, 4 Munf. 332, pl. 9; *Zeback v. Smith*, 3 Binn. 69.

for the time being to the donor's heirs.¹ Succinctly stated, if the devise be that "the executor shall sell," or that "the land shall be sold," only a naked power is granted. But a devise to the executor to sell, or words of similar import, will vest the legal title in him; it will be a power coupled with an interest.² All doubt is, of course removed where the will makes some other disposition of the legal estate.³ In New York, by statute, the executor in all such cases takes only a naked power, unless some duty is imposed upon him in regard to the management of the property, which would require its possession.⁴

§ 564. **Power enlarging the interest, with which it is coupled.** — If the power is general and coupled with an interest, the duration of which is not clearly defined, as where there is a devise of lands generally, with full power to dispose of them by deed or by will, the devise will be construed to be that of an estate in fee, and not simply a life estate with a general power in gross attached thereto. But if the

¹ *Gray v. Lynch*, 8 Gill, 403; *Hartley v. Minor's App.*, 53 Pa. 212; *Clary v. Frayer*, 8 Gill & J. 403; 4 Kent's Com. 320.

² *Yates v. Crompton*, 3 P. Wms. 308; *Lancaster v. Thornton*, 2 Burr, 1027; *Bergen v. Bennett*, 1 Caines' Cas. 16; *Doe v. Shotter*, 8 Adol. & Ell. 905; *Patton v. Crow*, 26 Ala. 426; *Clinefelter v. Ayers*, 16 Ill. 329; *Gregg v. Currier*, 36 N. H. 200; *Thornton v. Gailliard*, 3 Rich. 418; *Bayard v. Rowan*, 1 A. K. Marsh. 214; *Snowhill v. Snowhill*, 3 Zab. 447; *Killam v. Allen*, 52 Barb. 605; *Inman v. Jackson*, 4 Greenl. 237; *McKnight v. Wimer*, 38 Mo. 132; 1 Williams on Ex. 540; 4 Kent's Com. 326; 1 Sugden on Pow. 189-194; *Mosby v. Mosby*, and *Miller v. Jones*, 9 Gratt. 584; *Fluke v. Fluke*, 1 Greenl. 478; *Fay v. Fay*, 1 Cush. 93; *Howell v. Barnes*, Cro. Car. 382; *Haskell v. House*, 3 Brev. 242; *Ferebee v. Proctor*, 2 Dev. & B. 439; *Jackson v. Shauber*, 7 Cow. 18; *Peck v. Henderson*, 7 Yerg. 18; *Bloomer v. Waldron*, 3 Hill, 361; Co. Lit. 113 a, Hargrave's note, 2; *Greenough v. Wells*, 10 Cush. 571; *Gordon v. Overton*, 8 Yerg. 121.

³ *Den v. Aveling*, 1 Dutch. 449; *Hemingway v. Hemingway*, 22 Conn. 462; *Peter v. Beverley*, 10 Pet. 532; *Ladd v. Ladd*, 8 How. 10.

⁴ N. Y. Rev. Stat., Art. 2, sect. 68. In Pennsylvania a statute provides that in all such cases, whatever may be the phraseology used, the executor takes the power coupled with the estate. *Cobb v. Biddle*, 14 Pa. St. 444; *Brown v. Sterritt*, 27 Pa. St. 32; *Shippen's Heirs v. Clapp*, 29 Pa. St. 265.

power is special, or a particular estate is expressly given with a general power of disposal, the power will not enlarge the estate, and the testator's heirs^a will take as reversioners, if the power is not exercised.¹

§ 565. **Who can be donees.** — Any one, who is capable of holding and disposing of his own property, can be the donee of the power. It seems also that a purely collateral power may be exercised by an infant; but this is doubtful, and it is to be supposed that, where the power is to be executed by means of an instrument which an infant is not capable of making, he will not be able to execute the power until he becomes of age.² But a married woman can exercise a power as freely as if she were a *feme sole*. This is a common mode of enabling a married woman to dispose of the property secured to her by marriage settlement.³

¹ 1 Sugden on Pow. 179, 180; Flintham's App., 11 Serg. & R. 23, 24; Agee v. Agee, 22 Mo. 366; Fairman v. Beal, 14 Ill. 244; Bradley v. Westcott, 13 Ves. 445; Ramsdell v. Ramsdell, 21 Me. 288; Jennor v. Hardie, 1 Leo. 283; Jackson v. Robbins, 16 Johns. 537; Ward v. Amory, 1 Curt. C. Ct. 419; Burleigh v. Clough, 52 N. H. 272; Collins v. Carlisle's Heirs, 7 B. Mon. 13; Deadrick v. Armour, 10 Humph. 588; Jackson v. Coleman, 2 Johns. 391; McGaughey's Adm'rs v. Henry, 15 B. Mon. 383; Maundrell v. Maundrell, 10 Ves. 246; Herriek v. Babcock, 12 Johns. 389; Reinders v. Koppelman, 68 Mo. 482; 30 Am. Rep. 482; Green v. Sutton, 50 Mo. 190; Gregory v. Cowgill, 19 Mo. 415; Ruby v. Barrett, 12 Mo. 1; Randall v. Schrader, 20 Ala. 338; Urich's App., 86 Pa. St. 386; 27 Am. Rep. 707; Page v. Roper, 21 Eng. L. & E. 499. But this is not an absolutely invariable rule. If, from the whole will, it appears to have been the testator's intention to give a fee simple estate, the estate will be enlarged by the power, notwithstanding the devisee's estate has been expressly limited for life. Goodtitle v. Otway, 2 Wils. 6; Bradford v. Street, 11 Ves. 135; Doe v. Lewis, 3 Adol. & Ell. 123; Wilson v. Gaines, 9 Rich. Eq. 420; Andrews v. Brumfield, 32 Miss. 107; Denson v. Mitchell, 26 Ala. 360; Hoy v. Master, 6 Sim. 568; Robinson v. Dugale, 2 Vt. 181. And where the power annexed enlarges the estate into a fee, it will, if not expressly qualified, render any subsequent limitation void. Jones v. Bacon 68 Me. 34; s. c., 28 Am. Rep. 1; McKenzie's App., 41 Conn. 607; 19 Am. Rep. 525; Rona v. Meier, 47 Iowa, 607; 29 Am. Rep. 493.

² 4 Kent's Com. 624, 325; 1 Sugden on Pow. 181-211; 2 Washb. on Real Prop. 652.

³ 1 Sugden on Pow. 182; 4 Kent's Com. 325; Doe v. Eyre, 3 C. B. 578; s. c., 5 C. B. 741; Ladd v. Ladd, 8 How. 27; Hoover v. Samaritan Society, 5 Whart.

§ 566. **By whom the power may be executed.** — As a general proposition, only those who are named as the donees in the instrument creating the power can execute the power. The donee cannot assign it unless he is expressly authorized, nor can his personal representatives execute it unless expressly named.¹ This, however, is not true of powers in trust, or powers coupled with an interest, the execution of which does not require the exercise of a special discretion reposed in the particular donee. In the case of a power in trust, the court will not allow any accident to or neglect of the trustee — not even his death — to defeat the trust power. It will either compel the trustee to execute it or appoint a new trustee in his stead, who will have the same powers.² But the trustee cannot delegate his power without authority.³ A power coupled with an interest will ordinarily, not only survive the donee, but can be exercised by him, to whom the interest has been assigned, provided always the power is not expressly personal to the donee.⁴ Where the power is limited to several as a class, such as executors, trustees, or sons, although all must join in the execution, if alive, the power will survive the death of one or more; but there must be at least two surviving, in order to comply with the

445; *Wright v. Tallmadge*, 15 N. Y. 307; *Leavitt v. Pell*, 25 N. Y. 474; *Bradish v. Gibbs*, 3 Johns. Ch. 523; *Barnes v. Irwin*, 1 Dall. 201; *Rush v. Lewis*, 21 Pa. St. 72; *Doe v. Vincent*, 1 Houst. 416-427. See *ante*, sect. 469, note.

¹ 1 Sugden on Pow. 214, 215; 4 Cruise's Dig. 211; *Cole v. Wade*, 16 Ves. 27; *Tainter v. Clarke*, 13 Metc. 220-226; *Broom's Leg. Max.* 665.

² 2 Sugden on Pow. 158; *Greenough v. Wells*; *Hunt v. Rousmanire*, 8 Wheat. 207; *Gibbs v. Marsh*, 2 Metc. 243; *Wilson v. Troup*, 2 Cow. 236, 237; *Leeds v. Wakefield*, 10 Gray, 517.

³ *Story's Eq. Jur.* 1062; *Osgood v. Franklin*, 2 Johns. Ch. 21; *Berger v. Duff*, 4 Johns. Ch. 368; *Franklin v. Osgood*, 14 Johns. 562, 563; *Peter v. Beverley*, 10 Pet. 565; *Hertell v. Van Buren*, 3 Edw. Ch. 20; *Zebach v. Smith*, 3 Binn. 69; *Cole v. Wade*, 16 Ves. 28 n; 1 Sugden on Pow. 214-216; *Lewin on Tr.* 228.

⁴ *Hunt v. Rousmanier*, 8 Wheat. 203; *Wilson v. Troup*, 2 Cow. 236; *Berger v. Bennett*, 1 Caines' Cas. 15; *Hartley's v. Minor's App.*, 53 Pa. St. 212; *Jencks v. Alexander*, 11 Paige Ch. 619; *Doolittle v. Lewis*, 7 Johns. Ch. 45.

plural description of the donees.¹ In the case of executors, the rule is so far relaxed that a single survivor may execute the power; and where the power is coupled with an interest, the power may be exercised by those who qualify as executors; it is not necessary for the others to join in the execution of the power.² Its exercise does not, however, depend upon their qualification as executors; they may insist upon their right to join in the execution, even though they or any of them have failed to qualify or have resigned their executorships.³ And although by the law the executor, appointed by will in one State, may not be able to exercise the ordinary powers of an executor over lands situated in another State, yet he may execute a testamentary power of sale when so directed to do.⁴ Where the power is given to several donees *nominatim*, it indicates the repose of a personal discretion in each, and the power will not survive the death of one of them.⁵

§ 567. **Mode of execution.**—In the execution of the power the donee must observe strictly all the conditions and restrictions imposed by the donor, both as to the manner and the time of execution. The donor has the right to impose whatever conditions he pleases, and however unes-

¹ 1 Sugden on Pow. 144, 146; Story's Eq. Jur., sects. 1061, 1062, n; 4 Greenl. Cruise Dig. 211 n; Co. Lit. 113, Hargrave's note, 146; Tainter v. Clark, 13 Metc. 220; Franklin v. Csgood, 14 Johns. 553; Peter v. Beverley, 10 Pet. 564; Montefiore v. Browne, 7 H. L. Cas. 261.

² 4 Kent's Com. 320; Bergen v. Bennett, 1 Caines' Cas. 16; 1 Sugden on Pow. 144, 146; Osgood v. Franklin, 2 Johns. Ch. 19; Franklin v. Osgood, 16 Johns. 553; Peter v. Beverley, 10 Pet. 564; Tainter v. Clark, 13 Metc. 220; Drayton v. Grimke, 1 Bailey Eq. 392.

³ Tainter v. Clarke, 13 Metc. 220. See cases cited in note 2 *supra*.

⁴ Doolittle v. Lewis 7 Johns. Ch. 45-48. But see Hutchins v. State Bank, 12 Metc. 425.

⁵ Co. Lit. 113, Hargrave's note, 146; 4 Greenl. Cruise Dig. 211 n; Story's Eq. Jur., sects. 1061, 1062; 1 Sugden on Pow. 144-146; Loring v. Marsh, 27 Law Repos. 377; Peter v. Beverley, 10 Pet. 563; Franklin v. Osgood, 14 Johns. 553; Tainter v. Clarke; 13 Metc. 220; Cole v. Wade, 16 Ves. 27.

sential they may appear to be, a neglect of them would make the execution defective. They must be strictly complied with.¹ Thus a power to appoint by deed cannot be exercised by will; but if there is no restriction as to the kind of instrument, it may be either by deed or by will. So must all other special directions be observed.² If the power be to sell, the property can be sold only in the manner prescribed by the donor, and a power of sale will not ordinarily imply a power to mortgage.³

§ 568. **Who may be appointees.**—If it be a general power, any one whom the donee selects may take under the power. A wife may appoint the estate to her husband, and so may the husband to his wife.⁴ The donee may appoint himself.⁵ And if the donee appoints to A. to the use of B., the Statute of Uses will execute the use in A., leaving the use in B. unexecuted, it being a use upon a use.⁶ But this rule would not apply to powers which operated under the Statute of Wills. If it be a special power, it can be exercised only in favor of the special objects named. Thus

¹ 1 Sugden on Pow. 211, 250, 278; Langford v. Eyre, 1 P. Wms. 740; Habergam v. Vincent, 2 Ves. 231; Hawkins v. Kemp, 3 East, 410; Bentham v. Smith, Cheves Eq. 33; Andrews v. Roye, 12 Rich. 546; Vincent v. Bishop, 5 Exch. 683; Ladd v. Ladd, 8 How. 30-40; Burdett v. Spilsbury, 6 Mann. & Gr. 386; Wright v. Wakeford, 17 Ves. 451; Wright v. Barlow, 3 Maule & S. 512; Ives v. Davenport, 3 Hill, 373; Williams on Real Prop. 295.

² Ladd v. Ladd, 8 How. 30-40; Moore v. Dimond, 5 R. I. 130; Alley v. Lawrence, 12 Gray, 375; Majoribanks v. Hovenden, 1 Drury 11; 1 Chance on Pow. 273; Doe v. Peach, 2 Maule & S. 576; Hopkins v. Myall, 2 Russ. & Mylne, 86. See cases cited in note 46.

³ 1 Sugden on Pow. 513; 4 Kent's Com. 331; Bloomer v. Waldron, 3 Hill, 361; Leavitt v. Pell, 25 N. Y. 474; Ives v. Davenport, 3 Hill, 373.

⁴ 1 Sugden on Pow. 182; 4 Kent's Com. 325; Doe v. Eyre, 3 C. B. 578; s. c., 5 C. B. 741; Hoover v. Samaritan Society, 5 Whart. 445; Barnes v. Irwin, 2 Dall. 201; Ladd v. Ladd, 8 How. 27; Bradish v. Gibbs, 3 Johns. Ch. 523; Wright v. Tallmadge, 15 N. Y. 307; Leavitt v. Pell, 25 N. Y. 474; 2 Sugden on Pow. 24.

⁵ 2 Washb. on Real Prop. 660; Williams on Real Prop. 295, n. 1.

⁶ 1 Sugden on Pow. 229; 2 Prest. Abst. 248; 2 Washb. on Real Prop. 613.

a power of appointment to children will not support an appointment to grandchildren, unless in some unusual cases, strongly impregnated with circumstances, such as the non-existence of children at the time when the power was created, and the impossibility of other children being subsequently born, which clearly show an intention to refer to grandchildren under the name of children.¹ But the term *issue* is generally capable of embracing all descendants of every generation.²

§ 569. **Execution by implication.** — In order to insure a valid execution, the power should be expressly referred to in the instrument of execution; but this is not necessary if it appears in any way, upon the face of the instrument, or from the facts of the case, to have been the intention of the donee to exercise the power.³ And the courts have of late years so far relaxed the rule as to construe the instrument to be, by necessary intendment, a good execution of the power, if it cannot operate in any other way, notwithstanding the deed or will purports to dispose only of the individual property of the donee.⁴ A specific reference to the property subject to the power will be sufficient in the case of a collateral or naked power; but where the power is appendant or *in gross*, if there be no express reference to the power, only the legal estate, to which it is attached, will pass. The capacity of the instrument to operate upon the estate of the donee negatives any implied or presumed intention to exercise the power. And where the power is not coupled with an interest, if the donee has no property which he could dispose of by means of the instrument exe-

¹ 2 Sugden on Pow. 253; 4 Kent's Com. 345; Tud. Ld. Cas. 306; Wythe v. Thurlston, Ambl. 555; Horwitz v. Norris, 49 Pa. St. 211.

² Wythe v. Thurlston, Ambl. 555; Freeman v. Parsley, 3 Ves. 421.

³ 1 Sugden on Pow. 232; 4 Kent's Com. 334; Story's Eq. Jur., sect. 1062 a

⁴ Doe v. Vincent, 1 Houst. 416, 427.

uted, it will be a good execution of the power, though neither the power nor the property was referred to.¹

§ 570. **Excessive execution.**—To what extent an excessive execution will affect the validity of the appointment depends upon the ability to separate the good part from the bad part. If the excess can be separated and clearly distinguished from what would have been a valid execution, the latter will be sustained, and only the excess declared void. But if such a separation cannot be made without destroying the evidence of the donee's intention to exercise the power in the manner in which he could, the whole will be avoided, and a failure of execution will be decreed.² Thus, if the appointment be made to a number of persons, some of whom can take and others cannot, it will be good as to the former, at least, in the case of a general power. If the power be special, it would be good as to those who can take, provided the partial execution of the power in this manner does not affect the lawful rights of the others.³ So also if the donee appoints a larger sum or a larger estate than the power authorizes, the execution will be good within the limits of the power; or if he annexes to the appointment conditions which are prohibited or not authorized by the terms of the power, the illegal conditions will be void, and the appointee will take an absolute estate.⁴ In this connec-

¹ 4 Kent's Com. 335; *Amory v. Meredith*, 7 Allen, 397; *Blagge v. Miles*, 1 Story, 426; *White v. Hicks*, 33 N. Y. 392; *Jones v. Wood*, 16 Pa. St. 25; *Hay v. Mayer*, 8 Watts, 203; *Probert v. Morgan*, 1 Atk. 440; 1 Sugden on Pow. 432; 4 Cruise Dig. 212; Co. Lit. 271 b, Butler's note, 231; 2 Washb. on Real Prop. 612; *Doe v. Rooke*, 6 B. & C. 720; *Bepper's Will*, 1 Pars. Eq. Cas. 440; *Maryland Mut. Benev. Society v. Clendiner*, 44 Md. 429; 22 Am. Rep. 52.

² Tud. Ld. Cas. 306; 2 Sugd. Pow. 55, 62, 75; 4 Cruise Dig. 205; *Crompe v. Barrow*, 4 Ves. 681; *Warner v. Howell*, 3 Wash. C. Ct. 12; *Hay v. Watkins*, 3 Dru. & Warr. 339; *Alexander v. Alexander*, 2 Ves. sr. 640; *Funk v. Eggleston*, 92 Ill. 515; 34 Am. Rep. 136.

³ *Sadler v. Pratt*, 5 Sim. 632. See cases cited in note 58.

⁴ *Parker v. Parker*, Gibb. Eq. 168; 2 Sugden on Pow. 85; Tud. Ld. Cas. 317-319; *Alexander v. Alexander*, 2 Ves. sr. 640; 4 Cruise Dig. 202; *Roe v. Pri-*

tion it may be stated that the *cy pres* doctrine of construction applies to powers executed by will, as it does to all testamentary dispositions. If an appointment by will be void in part, when literally construed, and there appears on the face of the will a general intent, which would be a good execution of the power were it not for the special intent manifested by the manner in which he executes it, the general intent will prevail, and the appointment will be held to be good. Thus, if the appointment be to an unborn son for life, with remainder to his (the son's) unborn sons in tail, since the latter limitation is void as against the rule of perpetuity, the court would construe the appointment an estate tail in the first taker, instead of a life estate, there appearing to have been a general intent to that effect.¹

§ 571. **Successive execution.** — The appointment of a less estate than what may be created under the power will be good, unless there is an express restriction against a partial execution.² And as long as the power is not exhausted it may be exercised successively, at different times over different parts of the property, or over different estates in the same tract of land, whether the power is one of appointment or of revocation. And where it is intended that the power shall not be subsequently exercised, it is the custom to release it, where that is possible.³

§ 572. **Revocation of appointment.** — The donee cannot revoke his appointment, unless he expressly reserves the power of revocation in the instrument of appointment, or

deaux, 10 East, 158; *Powcey v. Bowen*, 1 Chan. Cas. 23; *Campbell v. Leach*, Ambl. 740.

¹ 2 Sugden on Pow. 60, 61; 2 Washb. on Real Prop. 666; *Robinson v. Hardcastle*, 2 T. R. 241; *Leeds v. Wakefield*, 10 Gray, 514, 519.

² 4 Cruise Dig. 205; 2 Washb. on Real Prop. 621-668; *Butler v. Heustis*, 68 Ill. 594; 18 Am. Rep. 589.

³ 1 Sugden on Pow. 342; 2 *Id.*, 43-45; 4 Cruise Dig. 200, 201; *Digges's Case*, 1 Rep. 174; Co. Lit. 271 b, *Butler's note*, 231; *Woolston v. Woolston*, 1 W. Bl. 281.

it is granted to him in the instrument of creation. And if the power may be exercised by deed or by will, the revocation of an appointment by deed will revive the power to appoint by will.¹

§ 573. **Defective execution — How and when cured.** — The general rule is that an execution, defective because of a failure to conform to the directions of the donor, will be nugatory, and the appointment absolutely void. And if the appointment is a mere gift to the appointee, and the power is general and free from the character of a trust, the slightest defect will invalidate the execution.² But if the power is special, or the execution is a trust and a peremptory duty upon the donee, or if the donee has received a valuable consideration for the appointment, equity will correct or make good the defective execution by ordering a re-execution, provided there has been a substantial compliance with the conditions of execution, and the defect relates to the formalities of execution, such as the number of attesting witnesses, the technical words of limitations, or conveyance, etc.³

§ 574. **Non-execution.** — But if the donee has failed altogether to execute the power, or disregarded the material conditions imposed by the donor upon its execution, equity will not interfere to compel an execution, unless the power be a trust, the execution of which is mandatory. In such a case equity will not permit any accident or neglect of the donee to defeat the trust, and thus deprive the beneficiaries of their rights under the power. All mandatory powers,

¹ 2 Sugden on Pow. 243; Co. Lit. 271 b, Butler's note, 231; Saunders v. Evans, 8 H. L. Cas. 721.

² 2 Sugden on Pow. 98; Tud. Ld. Cas. 317.

³ Story Eq. Jur., sects. 169-175; 2 Sugden on Pow. 88, *et seq.*; 4 Cruise Dig. 222, *et seq.*; Cotter v. Layer, 2 P. Wms. 622; Tollet v. Tollett, 2 P. Wms. 489; Schenck v. Ellenwood, 3 Edw. Ch. 175; Hunt v. Rousmaniere, 2 Mason, 251; Roberts v. Stanton, 2 Munf. 129; McRea v. Farrow, 4 Hen. & M. 444.

whether general or special, are trusts, and courts of equity will execute such powers, even if the donee has failed to exercise the power, and died. But there can never be any interference by the courts with discretionary powers, if the donees have refused to exercise them.¹

§ 575. **Rules of perpetuity applied to powers.**—The rule against perpetuity finds application both to the limitations of the power and to the estates created under the power. If the power can be exercised only at a time beyond that within which all limitations must take effect in possession, viz.: a life or lives in being and twenty-one years thereafter, the power is void. It is, therefore, generally necessary to place a limitation upon the time within which the power may be exercised. A power to one and his heirs, without express or implied limitation, would be void, at least so far as the heirs are concerned.² The greatest difficulty has been experienced in applying the rule against perpetuity to the estates appointed under the power. If the power is special, and the appointment is limited to a person or to persons, none of whom can take from being too remote under the rule, the power is absolutely void. But if the power permits an appointment among a class, some of whom can take, and a discretion is left in the donee as to which individuals of the class shall be appointed, the power will be void as to those who cannot take. The possibility of an illegal appointment will not invalidate the power, if it is in the end properly exercised by an appointment to lawful persons.³ In determining the validity of an

¹ Story Eq. Jur., sects. 169–175, 1062; 2 Sugden on Pow. 88, *et seq.*; 4 Cruise Dig. 222, *et seq.*; Gorin v. Gordon, 38 Miss. 214; Neves v. Scott, 9 How. 196–213; Sedgwick v. Laflin, 10 Allen, 432; 1 Sugden on Pow. 158.

² Bristow v. Warde, 2 Ves. 350; Ware v. Polhill, 11 Ves. 283.

³ 1 Sugden on Pow. 471–475; 2 Washb. on Real Prop. 672–675; Co. Lit. 271 b, Butler's note, 231; Gilbert's Uses, 160 n; Marlborough v. Godolphin 2 Ves. sr. 61; Routledge v. Dorril, 2 Ves. jr. 368; Griffith v. Pownall, 13 Sim. 393.

appointment under a special power in respect to perpetuity, the appointment must be viewed in its relation to, and as a part of, the original instrument creating the power, and must be considered in the light of the circumstances surrounding the estate and the parties thereto, when the original instrument was executed, if the power be created by deed, and at the death of the testator, if by will. Thus a power to appoint among grandchildren cannot be exercised in favor of such grandchildren, whose parents were not in being at the time that the power was created.¹ But if it be a general power, it is so much like an estate in fee, in respect to the restriction against alienation, an appointment will be good if at the time when the power was exercised it did not offend the doctrine of perpetuity. The validity of an appointment under a general power is determined by its condition when made, and not considered as a part of the instrument in which the power was created. An appointment under such a power to unborn children of parents who are *in esse* at the time of execution, but unborn at the time of creation of the power, would be good. The restriction upon alienation only began when the appointment was made.²

§ 576. **Rights of donee's creditors in the power.** — The power not being an estate in the land, if the donee's creditors have any interest in the same or in the estate created under the power, it can only be an equitable claim. The donee's creditors have no legal rights in the power.³ Where the power is general and coupled with an interest, a sale of the interest will prevent the subsequent exercise of the

¹ 2 Washb. on Real Prop. 671; Co. Lit. 271 b, Butler's note, 231; 1 Sugden on Pow. 471-475; 2 Prest. Abst. 165, 166; Routledge v. Dorril, 2 Ves. jr. 357; Hockley v. Mawbey, 1 Ves. jr. 150.

² 2 Washb. on Real Prop. 671; Fearn's Exec. Dev. 5, Powell's note; 1 Sugden on Pow. 516.

³ Blake v. Irwin, 3 Kelly, 345; Johnson v. Cushing, 15 N. H. 298; Townsend v. Windham, 2 Ves. jr. 3; Covendale v. Aldrich, 19 Pick. 391.

power.¹ In no case can the donee's creditors acquire an interest in, or prevent the execution of a special power. It is also definitely settled that where the donee has not exercised his general power, there is no interest in the donee to which the rights of creditors may attach.² Nor can the creditors, through their assignee in bankruptcy, under the bankrupt law of 1867, execute the power for their benefit.³ But it has been held that where the appointment is made under the power to a voluntary appointee, the creditors may levy upon the estate in the appointee's hands; and that the appointee always takes the estate subject to the payment of the donee's debts, if the donee might have exercised the power in favor of his creditors.⁴ Since the creditors have no interest in the power itself, and cannot execute it or compel its execution in their favor; and since the donee never had any other interest in the property except the power, and the estate of the appointee passed to him directly from the donor, it is difficult to understand by what course of reasoning the position of these two courts can be sustained.

§ 577. **The rights of creditors of the beneficiaries.**—As a matter of course, if a special power or trust is exercised, the judgment-creditors may levy upon the beneficiary's share in the proceeds of sale. But they cannot compel the donee to execute the power.⁵ And if the legal title descended to the beneficiary, subject to a power of

¹ *Hobbs v. Smith*, 15 Ohio St. 419. See *ante*, sect. 561.

² *Tallmadge v. Sill*, 21 Barb. 34; *Johnson v. Cushing*, 15 N. H. 298; *Lavender v. Lee*, 14 Ala. 688; *Strong v. Gregory*, 19 Ala. 146. See *Thorpe v. Goodall*, 17 Ves. jr. 338, 460; *Holmes v. Coghill*, 12 Ves. 206; *Jenny v. Andrews*, 6 Madd. 264.

³ *Jones' Assignee v. Clifton*, U. S. Cir. Ct. Dist. of Kentucky (1878), 7 Cent. L. J. 89.

⁴ *Johnson v. Cushing*, 15 N. H. 298; *Tallmadge v. Sill*, 21 Barb. 34.

⁵ *Chew's Ex'ors v. Chew*, 28 Pa. St. 17.

sale, whatever interests the beneficiary's creditors and grantees acquire in the estate will be defeated by the subsequent exercise of the power, but they will in equity attach at once to the beneficiary's share in the proceeds of sale.¹

¹ *Allison v. Wilson v. Wilson's Ex'ors*, 13 Serg. & R. 330; *Reed v. Underhill*, 12 Barb. 113.

CHAPTER XVI.

INCORPOREAL HEREDITAMENTS.

SECTION I. *Rights of Common.*

II. *Easements.*

III. *Franchises.*

IV. *Rents.*

SECTION 587. Incorporeal hereditaments defined.

588. Kinds of incorporeal hereditaments.

§ 587. **Incorporeal hereditaments defined.** — An incorporeal hereditament is a right of an intangible nature which descends to the heir like corporeal hereditaments. It is rather a right in, or issuing out of, a corporeal hereditament, than a right to or of such kind of property. The enjoyment and exercise of the right produces substantial results, but the results are to be distinguished from the right, and do not constitute the incorporeal hereditament. The Roman *jura in re alieno* comprised a very large class of those rights, which are in our law comprehended under the term *incorporeal hereditaments*.

§ 588. **Kinds of incorporeal hereditaments.** — Blackstone mentions nine principal classes of incorporeal hereditaments, viz.: (1) Commons; (2) Easements; (3) Rents; (4) Advowsons; (5) Corodies; (6) Annuities; (7) Franchises; (8) Offices; (9) Dignities. Of these, Commons, Easements, Rents and Franchises pertain to this country. The others do not now, if they ever did, exist here, and can very well be omitted. In presenting this subject the discussion will be confined to I. Rights of Common; II. Easements; III. Rents; and IV. Franchises.*

SECTION I.

RIGHTS OF COMMON.

SECTION 591. Definition.

592. Kinds of rights of common.

593. Commons appendant and appurtenant.

§ 591. **Definition.** — A right of common is a right which one may have in another's land, to take from it certain substantial products, which constitute a part of the realty because of their connection therewith. An easement is also a right in, or issuing out of, another's land, and constitutes a burden upon it, as will be seen in the next section; but it only relates to such modes of enjoyment which may be had without drawing from it anything which, in contemplation of law, is a part of the land. A right of common is known also by the Norman French term *profit a prendre*, a right to take something from the land. As will be seen, the term *right of common* has lost its significance in this country. An easement may prevent the owner of adjacent land from building so near the boundary as to exclude the light and air from one's residence, or it may consist in the right to keep a stream free from obstruction while flowing through the adjoining land above; but light, air and water are not a part of the realty, and, therefore, one cannot have a right of common in them. Another distinction is that a right of common does not impose any obligation upon the owner of the land to maintain a supply of the thing taken, while an easement may contain such an obligation. Such an obligation may be the very essence of the easement.¹

§ 592. **Kinds of rights of common.** — There are four important kinds of common, viz.: Common of pasture,

¹ 2 Bla. Com. 32.

piscary, turbary and estovers. Common of pasture is a right of pasturing cattle upon the land of another. Common of piscary is the right to fish in the streams which pass through another's land. Common of turbary consisted in the right to dig turf or peat for use as fuel. Of the same character would be the right to dig coal for the same purpose. Common of estovers was a right of the same nature, being a right to take whatever wood is necessary for use on the farm, for the purpose of fuel, repairing the ploughs and other agricultural implements, or the hedges and fences. According to the use to which the wood was put, they were respectively called house-bote, plough-bote and cart-bote, and hay-bote or hedge-bote. The enjoyment of these rights of estovers was limited to a reasonable degree, and the wood could be used only as far as it was necessary for the purposes of the farm.¹

§ 593. **Commons appendant and appurtenant.** — At common law rights of common were divided into two classes, common appendant, and common appurtenant. Common appendant was the more usual kind. It arose from the peculiar condition of the English tenantry, and more especially out of the manor system of holding lands. When the lord of the manor rented his arable land to his tenant, he gave with this land these rights of common, so that the tenant would be able to obtain everything necessary for the successful conduct of the farm. Thus the tenant has a right to pasture his cattle upon the waste land of his lord, to take the necessary wood from the forests, etc.² Common appendant does not exist in this country, except perhaps in connection with the manors on the banks of the Hudson River in the State of New York. Whatever commons are created here are of the class known at common

¹ 2 Bla. Com. 32–35.

² 2 Bla. Com. 33.

law as common appurtenant, or *in gross*. They rest upon grant, express or implied. When implied, the right is acquired by prescription, or under the Statute of Limitations. Common appurtenant and common appendant were annexed to some land held by the person enjoying the right, while common *in gross* was to a man and his heirs, independent of any land he may hold.¹ The subject possesses very little importance in this country, and inasmuch as commons are now created in the same manner as easements, they receive almost the same construction. The subject, therefore, needs no special treatment beyond what has been already said. The principal American cases are cited below.²

¹ 2 Bla. Com. 33, 34.

² Knowles *v.* Nicholls, 2 Curt. 571; Donnell *v.* Clark, 19 Me. 174; Thomas *v.* Mansfield, 13 Pick. 249; Hall *v.* Lawrence, 2 R. I. 218; Smith *v.* Floyd, 18 Barb. 522; Perkins *v.* Perkins, 44 Barb. 134; Van Rensselaer *v.* Radcliffe, 10 Wend. 639; Livingston *v.* Ten Broeck, 16 Johns. 14; Bell *v.* Ohio & Penn. R. R. Co., 25 Pa. St. 161; Hebert *v.* Lavalle, 27 Ill. 448; Funkhouser *v.* Langkopf, 26 Mo. 45.

SECTION II.

EASEMENTS.

- SECTION** 597. What are easements.
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599. How acquired.
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§ 597. What are easements. — As has been explained in distinguishing between commons and easements, the latter are rights of enjoyment in, or issuing out of, another's land, which restrict or limit the owner's right of enjoyment, either affirmatively, by giving another person a right to use the land for certain purposes, as, for example, a right of passing over the land, or negatively, by restraining the owner from using it in a particular manner, such as the

erection of buildings so near to the boundary line as to exclude the light and air from the residence of an adjoining proprietor. An easement can only exist as appurtenant to an estate in lands. Two estates are thereby brought into relation with each other, and the existence of both is necessary to the maintenance of an easement. They are called the *dominant* and *servient* estates. The *dominant* estate is the one enjoying the easement, and to which it is attached; the *servient* estate is the one upon which the easement is imposed. As appurtenant to the dominant estate, the easement passes with it into whose hands soever the land may come. The easement cannot be severed from it.

§ 598. **When merger takes effect.** — When the dominant estate falls into the possession of the owner of the servient estate, the easement is extinguished if the two estates are co-equal and co-extensive, since no man can have an easement in his own land.¹ If the title to either of the estates proves defective, the easement is only suspended while the two estates are in the possession of the one owner.² So if the dominant estate, which is transferred to the owner of the servient estate, is less in point of duration than the servient, the easement will only be suspended during the union of the two estates, and will revive upon their separation.³ And it may be stated generally that, wherever the extinguishment of an easement will operate as an injury to some one having rights in the same, equity will limit the effect of the union of the estates to suspension during such union, and the easement will revive, in favor of the parties having rights in it, at the termination of the union.

¹ *Atwater v. Bodfish*, 11 Gray, 150; *Wolfe v. Frost*, 4 Sandf. Ch. 71; *Seymour v. Lewis*, 11 N. J. 450.

² *Tyler v. Hammond*, 11 Pick. 193.

³ *Grant v. Chase*, 17 Mass. 443; *Carbrey v. Willis*, 7 Allen, 374; *Brakely v. Sharp*, 6 N. J. Eq. 9; *McTavish v. Carroll*, 7 Md. 352; *Pearce v. McClenaghan*, 5 Rich. 178.

§ 599. **How acquired.** — Easements are acquired by grant, express or implied, or by prescription, which presupposes a grant. The doctrine of prescription as known at the common law is no longer in practical operation. It has been superseded by Statutes of Limitation, which fix a time in which a right may be acquired by adverse possession or enjoyment. The subject of title by prescription or limitation will be treated more fully in subsequent pages. These Statutes of Limitations do not in express terms refer to easements, but courts have generally applied to easements their provisions concerning rights in real property. It is, therefore, a general rule that a right of easement is acquired by prescription within the time prescribed by the Statute of Limitation for the recovery of lands.¹ But since the application of the statute to the case of easements rests upon analogy, the statutory period has been held to raise only a legal *presumption* that a grant has been made, and does not operate as a *legal bar*. The presumption can be rebutted in evidence, showing that there had been no grant.² But the rule is not uniform, there being cases which hold that it is a conclusive presumption.³

§ 600. **Easements by express grant** — Are created by deed, containing an express reservation of the right. It cannot be created by parol.⁴ It need not be reserved in

¹ *Campbell v. Wilson*, 3 East, 294; *Richard v. Williams*, 7 Wheat. 59; *Stearns v. Jones*, 12 Allen, 582; *Watkins v. Peck*, 13 N. H. 360; *Hammond v. Zechner*, 21 N. Y. 118; *Jones v. Crow*, 32 Pa. St. 398; *Carlisle v. Cooper*, 19 N. J. Eq. 256.

² *Tinkham v. Arnold*, 3 Me. 120; *Parker v. Foote*, 19 Wend. 309; *Sherwood v. Burr*, 4 Day, 244.

³ *Bensley v. Shaw*, 6 East, 208; *Wright v. Howard*, 1 Sim. & S. 190; *Tyler v. Wilkinson*, 4 Mason, 397; *Sargent v. Ballard*, 9 Pick. 255; *Garrett v. Jackson*, 20 Pa. St. 331. It is probable that this may now be considered as the generally prevailing law.

⁴ *Brown on Statute of Frauds*, sect. 232; *Bryan v. Whistler*, 8 B. & C. 288; *Knight v. Dyer*, 57 Me. 174; *Trammell v. Trammell*, 11 Rich. 474; *Fuhr v. Dean*, 26 Mo. 116.

the same deed which creates or conveys the dominant estate; it may be granted in a separate deed.¹ It may also be created in a deed conveying the servient estate by reservation to the grantor.² For the creation of an easement by express grant upon one estate in favor of another, there need not be any prior unity of title or estate in the two parcels of land. There need not be any previous connection whatever between the two estates or their owners.³

§ 601. **Implied grants.**—An easement is created by implied grant where the easement is so essential to the enjoyment of the estate granted, that it is necessary to be implied to prevent the conveyance from operating as an injury to the grantee. Thus, if a man conveys a parcel of land, surrounded on all sides by his own land, so that the grantee cannot get to the land conveyed, except by passing over the other lands of the grantor, the law implies that a right of way over such lands was granted in the deed.⁴ What shall be considered such a necessity as will raise an easement by implication depends upon the facts of each particular case. It is a well established rule that the necessity need not be absolute. If the enjoyment of the estate granted cannot be complete without the easement, except at an unusual expense, or inconvenience, the easement will be implied.⁵ The enjoyment of the land without the easement need not be absolutely impossible. Thus, in the case of a right of way, it is not necessary that the land should be entirely surrounded, in order to create by implication an

¹ *Gerrard v. Cook*, 2 Bos. & P. N. R. 109; *Holms v. Sellers*, 3 Lev. 305.

² *Pettee v. Hawkes*, 13 Pick. 323.

³ *Gibert v. Peteler*, 39 N. Y. 165.

⁴ *Pomfret v. Ricord*, 1 Saund. 322; *Proctor v. Hodgson*, 10 Exch. 624. See *post*, sect. 609.

⁵ *O'Rorke v. Smith*, 11 R. I. 259; s. c., 23 Am. Rep. 440; *Carbrey v. Willis*, 7 Allen, 364; *Johnson v. Jordan*, 2 Metc. 234; *Plimpton v. Converse*, 42 Vt. 712; *Suffield v. Brown*, 33 L. J. (N. S.) Ch. 249; s. c., 10 Jur. (N. S.) 111.

easement of way over the grantor's lands ; it will be sufficient if the land granted is to such an extent surrounded, that the grantee can get to it only with great difficulty and inconvenience.

§ 602. **Equitable easements.** — Corresponding to, and forming a part of, the subject of implied easements, is the doctrine of equitable easements. At law it is impossible for an easement to exist between two estates owned by the same person. If the two parcels had had separate owners upon the union of them in the one owner, as we have seen, the easement would at least be suspended during the continuance of such union and revive upon their separation. The easement would revive only when the dominant and servient estates were of unequal value in the matter of duration.¹ But notwithstanding the fact that at law there can be no easement in favor of one parcel imposed upon another, both being held by the same owner, yet in equity such a relation may exist. If the owner of two parcels so uses them as to make one servient to the other, as, for example, in the construction of a drain carrying waste water from one estate over the other, in equity an easement will be imposed upon one lot in favor of the other, which, upon the severance of ownership by alienation, assumes the character of a legal easement.² Especially does an easement arise when the *quasi* dominant estate is granted to another. If the *quasi* servient estate has been conveyed, it is a question of some doubt whether there is reserved to the grantor by implication an easement to maintain the drain or other burden upon

¹ See *ante*, sect. 598.

² *Pyer v. Carter*, 40 Eng. L. & Eq. 410; *Guy v. Brown*, 5 Moore, 644; *Johnson v. Jordan*, 2 Metc. 234; *Kenyon v. Nichols*, 1 R. L. 411; *New Ipswich Factory, v. Batchelder*, 3 N. H. 190; *Brakely v. Sharp*, 9 N. J. Eq. 9; *s. c.*, 10 N. J. Eq. 206; *Kieffer v. Imhoff*, 26 Pa. St. 438; *McTavish v. Carroll*, 7 Md. 352; *Jones v. Jenkins*, 34 Md. 1; 6 Am. Rep. 300; *Lampman v. Milks*, 21 N. Y. 505; *Hubbard v. Town*, 33 Vt. 295; *Gerber v. Grubell*, 16 Ill. 217

the granted estate. The authorities, English and American, are at variance on this question. In this country the better opinion is that the rule would be the same as in the case of the conveyance of the *quasi* dominant estate,¹ if it was strictly necessary to the enjoyment of the dominant estate, and the existence of the easement is apparent or known to the grantee.

§ 603. **Easement implied from covenant.**—Somewhat similar are the cases where, in the conveyance of several parcels of land to different grantees, the grantor imposes a restriction upon the use and mode of enjoyment of the land so granted, which creates a mutual benefit to the owners of the several parcels. Even though the restriction be in the form of a covenant, equity will construe it to have the binding force of an easement, and will sustain an action for its enforcement in favor of any one of the owners. They are covenants running with the land, and can be enforced by any one in whose possession any one of the parcels should fall. Such would be the case where, in granting several parcels of land, the conveyances contain covenants that any buildings thereafter erected upon any one of them shall be set back from the street a certain distance. An injunction would be granted at the suit of either of the owners of the several pieces of property restraining another from violating the covenant.²

¹ *Warren v. Blake*, 54 Me. 289; *Johnson v. Jordan*, 2 Metc. 234; *Carbrey v. Willis*, 7 Allen, 369; *Randall v. McLaughlin*, 10 Allen, 366; *Keats v. Hugo*, 115 Mass. 204; 15 Am. Rep. 80; *Butterworth v. Crawford*, 46 N. Y. 349; 7 Am. Rep. 352; *Parsons v. Johnson*, 68 N. Y. 62; 23 Am. Rep. 149; *Haverstick v. Sipe*, 33 Pa. St. 368; *McCarty v. Kitchenman*, 47 Pa. St. 243; *Powell v. Simms*, 5 W. Va. 1; 13 Am. Rep. 629; *Turner v. Thompson*, 58 Ga. 268; 24 Am. Rep. 297; *Mullen v. Stricker*, 19 Ohio St. 135; 2 Am. Rep. 379; *Morrison v. Marquardt*, 24 Iowa, 35. But see *Jones v. Jenkins*, 34 Md. 1; 6 Am. Rep. 300; *Hubbard v. Town*, 33 Vt. 295; *Gerber v. Grubell*, 16 Ill. 217.

² *Whatman v. Gibson*, 9 Sim. 193; *Harrison v. Good*, L. R. 11 Eq. 338; *Parker v. Nightingale*, 6 Allen, 341; *Hubbell v. Warren*, 8 Allen, 173; *Greene*

§ 604. **Rights of action in defence of easements.** — The actions are of two kinds, (1) by injunction or by *mandamus*, restraining some future injury or impairment of the easement, or enforcing the performance of the conditions of such easement, and (2) an action for damages for the obstruction to, or interference with, the easement which has already happened.¹ And in order to sustain the action for damages, no actual damage need be proven. It would be an *injuria sine damno*, or wrong without a damage, which is always actionable.

§ 605. **How easements may be lost or extinguished.** — This may occur (1) by acts of the owner of the dominant estate, or (2) by acts of the owner of the servient estate. An easement may be released by deed of the owner of the dominant estate, or it may be lost by abandonment. It cannot be released by parol agreement, unless the agreement is carried into execution by some affirmative act, as the creation of a new easement in the place of the old one, so that by non-user the first has been lost.² Mere non-user,

v. Creighton, 7 R. I. 1; *Wolfe v. Frost*, 4 Sandf. Ch. 72; *Tallmadge v. East River Bk.*, 26 N. Y. 105; *Brewer v. Marshall*, 19 N. J. Eq. 543; *Winfield v. Henning*, 21 N. J. Eq. 188; *Clark v. Martin*, 49 Pa. St. 290; *St. Andrew's Church Appeal*, 67 Pa. St. 518. In the same manner a covenant to build and maintain a party wall, if the wall has been constructed, will operate as an easement. *Richardson v. Tobey*, 121 Mass. 457; 23 Am. Rep. 283. But an *executory* agreement or covenant to build a party wall cannot operate as an easement, since such a covenant does not run with the land, and is binding only upon the covenantor. *Cole v. Hughes*, 54 N. Y. 444; 13 Am. Rep. 611.

¹ 2 Washb. on Real Prop. 339; Tud. Ld. Cas. 129.

² *Liggins v. Inge*, 7 Bing. 682; *Ward v. Ward*, 7 Exch. 838; *Stokes v. Hewsinger*, 8 E. & B. 811; *Moore v. Rawson*, 3 B. & C. 332; *Regina v. Chorley*, 12 Q. B. 515; *Corning v. Gould*, 16 Wend. 531; *Jewett v. Jewett*, 16 Barb. 150; *Jackson v. Dysling*, 2 Caines, 20; *Smyles v. Hastings*, 22 N. Y. 217; *Arnold v. Stevens*, 24 Pick. 106; *Williams v. Nelson*, 23 Pick. 141; *French v. Braintree Manf. Co.*, 23 Pick. 216; *Jennison v. Walker*, 11 Gray, 423; *Pope v. Devereux*, 5 Gray, 409; *Hayford v. Spokesfield*, 100 Mass. 491; *Manning v. Smith*, 6 Conn. 289; *Mowry v. Sheldon*, 2 R. I. 369; *Dyer v. Depui*, 5 Whart.

even though for twenty years, will not of itself extinguish the easement. It must be accompanied with the express or implied intention of abandonment, and the owner of the servient estate, acting upon the intention of abandonment and the actual non-user, must have incurred expenses upon his own estate. The three elements, non-user, intention to abandon and damage to the owner of the servient estate, must concur in order to extinguish the easement. In cases of easements created by prescription the last element is not considered essential. The easement may also be destroyed when the owner of the dominant estate gives a license to the owner of the servient estate to perform or do certain acts upon the servient estate, the performance of which will effectually prevent the enjoyment of the easement. The execution of the license will destroy or extinguish the easement, since the license is irrevocable after execution.¹ Finally, any actions on the part of the owner of the dominant estate, which increase the burden upon the servient estate and which so materially change the easement, as that it cannot be restored to its original condition, will operate in a discharge of the servient estate from the burden of the easement. But if the increase in the burden can be separated from the original easement, the latter will still remain.² In the same way as easements may be acquired by prescription, so may they also be lost or extinguished. This subject is similar in its character, and is allied to the subject of loss by abandonment.

584; *Hall v. McCaughey*, 51 Pa. St. 43; *Pue v. Pue*, 4 Md. Ch. 386; *Parkins v. Dunham*, 3 Strobl. 221; *Pearce v. McClenaghan*, 5 Rich. 178.

¹ *Winter v. Brockwell*, 8 East, 308; *Liggins v. Inge*, 7 Bing. 682; *Dyer v. Sanford*, 9 Metc. 395; *Addison v. Hack*, 2 Gill, 221; *Elliott v. Rhett*, 5 Rich. L. 405.

² *Luttrell's Case*, 4 Rep. 87; *Saunders v. Newman*, 1 B. & Ald. 258; *Garratt v. Sharp*, 3 A. & E. 325; *Blanchard v. Bridges*, 4 A. & E. 176; *Hall v. Swift*, 6 Scott, 167; *Cherrington v. Abney Mill*, 2 Vern. 646; *Bullen v. Runnells*, 2 N. H. 255; *Whittier v. Cochero Mfg. Co.*, 9 N. H. 454; *Taylor v. Hampton*, 4 McCord, 96.

§ 606. **Kinds of easements.** — The easements most commonly known are *right of way*, *light and air*, *water*, *support*, and *party walls*. Many other servitudes may be imposed upon the land, but a discussion of the classes just mentioned will be sufficient to illustrate the general principles.

§ 607. **Right of way.** — Rights of this character are divided into *private*, where the right is in favor of one or more private individuals, and is appurtenant to an estate owned by them, and *public*, where it is enjoyed by the public generally. They are easements imposed upon another's land, authorizing certain persons or the public, as the case may be, to pass over it, in pursuit of specific or general objects.

§ 608. **A private way**—May be created by express grant, or it may be implied from the circumstances surrounding the estate granted (these are called ways of necessity), or it may further be acquired by prescription. A way acquired for a particular mode of use will not be extended so as to include the right to use it in some other manner. Thus, if the right be limited to a foot-path, it cannot be used as a carriage-way or horse-way. Such an extension of the right would be an act of trespass, and render the owner of the dominant estate liable for damages to the owner of the servient estate. This would be the case, even though the burden upon the servient estate has not been materially increased.¹ Neither can the way be used for the benefit of any other estate but the one to which the easement is ap-

¹ *Brunton v. Hall*, 1 Gale & D. 207; *Cowling v. Higginson*, 4 Mees. & W. 245; *Ballard v. Tyson*, 1 Taunt. 279; *Allan v. Gourme*, 11 A. & E. 759; *French v. Marstin*, 24 N. H. 440; 32 N. H. 316; *Kirkham v. Sharp*, 1 Whart. 323. But a general right of way will be inferred from evidence that the way has been used in every manner necessary for the full enjoyment of the dominant estate. *Parks v. Bishop*, 120 Mass. 340; 21 Am. Rep. 519.

purtenant.¹ Where the way is acquired by express or implied grant, the owner of the servient estate has the right to lay out the way in whatever manner will be most convenient to him, and will at the same time secure to the owner of the dominant estate the full enjoyment of the easement. But if the owner of the servient estate refuses to do this, the owner of the dominant estate may exercise the power. Once the way has been laid out, it cannot be changed by either party without the consent of the other.²

§ 609. **Ways of necessity.** — A way of necessity exists where the land granted is completely environed by land of the grantor, or partially by his land, and the land of strangers. The law implies from these facts that a right of way over the grantor's lands was granted to the grantee as appurtenant to the estate. Inasmuch as the implication is raised from the existence of a necessity, the easement expires with the cessation of the necessity, as, for example, when a new way is acquired.³ When such a necessity exists as will create by implication a right of way, is a question of fact determined by the circumstances of each particular case. Mere inconvenience will not constitute such necessity. It must be a strict necessity; but excessive expense in pro-

¹ Colchester v. Roberts, 4 Mees. & W. 769; Williams v. James, L. R. 2 C. B. 580; Northam v. Hurley, 1 E. & B. 665; Senhouse v. Christian, 1 T. R. 560; Garritt v. Sharp, 3 A. & E. 325; Russell v. Jackson, 2 Pick. 574; Comstock v. Van Deusen, 5 Pick. 163; Davenport v. Lamson, 21 Pick. 72; French v. Marstin, 24 N. H. 440; 32 N. H. 316.

² Henning v. Burnett, 8 Exch. 187; Northam v. Hurley, 1 E. & B. 665; Garritt v. Sharp, 3 A. & E. 325; Russell v. Jackson, 2 Pick. 574; Jennison v. Walker, 11 Gray, 426; Holmes v. Seeley, 19 Wend. 507.

³ Pettingill v. Porter, 8 Allen, 1; Baker v. Crosby, 9 Gray, 421; Vial v. Carpenter, 14 Gray, 126; Kimball v. Cocheco R. R. Co., 27 N. H. 448; Abbott v. Stewartstown, 47 N. H. 258; Pierce v. Selleck, 18 Conn. 321; Simmons v. Sines, 4 Keyes (N. Y.), 153; N. Y. Life Ins., etc., Co. v. Milnor, 1 Barb. Ch. 352; Wissler v. Hershey, 23 Pa. St. 333; McTavish v. Carroll, 7 Md. 352; Thomas v. Bertram, 4 Bush, 317; Brown v. Berry, 6 Coldw. (Tenn.) 98.

curing another way would make it a case of strict necessity.¹

§ 610. **Who must repair the way.** — In the absence of an express agreement, the grantee of the right of way must keep the way in repair; and if he fails to do so, he has no right to use other adjacent land of the servient estate because the way has become impassable. But the obligation to repair may by covenant be imposed upon the owner of the servient estate. In such a case, if the latter violates the agreement, the grantee of the way may, if it is necessary, pass over the adjoining land of the servient estate.²

§ 611. **Public or highways.** — Here no reference is made to such highways where the fee simple title to the land is in the State or municipal corporation. In such cases there can be no question in respect to easements. This section relates to such cases where the land, over which the highway extends, belongs to the owners of the contiguous land, and a right of way over it is enjoyed by the public.³ Such highways are established either by dedication by the owners of the land, or by appropriation by the State under the right of *eminent domain*. In the case of dedication no formal acts are necessary to the creation of the way. Any act or

¹ *Pettingill v. Porter*, 8 Allen, 1; *Carbrey v. Wilson*, 7 Allen, 364; *Johnson v. Jordan*, 2 Metc. 234; *Brigham v. Smith*, 4 Gray, 297; *Plimpton v. Converse*, 42 Vt. 712; *O'Rourke v. Smith*, 11 R. I. 259; 23 Am. Rep. 440; *Bartlett v. Prescott*, 41 N. H. 493; *McDonald v. Lindall*, 3 Rawle, 492; *Ogden v. Grove*, 38 Pa. St. 487; *Turnbull v. Rivers*, 3 McCord, 131; *Screven v. Gregory*, 8 Rich. 158; *Ramirez v. McCormick*, 4 Cal. 245.

² *Pomfret v. Ricord*, 1 Saund. 323; *Bullard v. Harrison*, 4 M. & S. 387; *Rider v. Smith*, 3 T. R. 766; *Doane v. Badger*, 12 Mass. 65; *Jones v. Percival*, 5 Pick. 485; *Hamilton v. White*, 5 N. Y. 9.

³ The right of the public to the use of a highway, where the soil or bed belongs to the adjoining owners, is not strictly an easement; it is an incorporeal hereditament *in the nature of* an easement. Since the subject of highways is not to be treated at any length, it is discussed in this connection to avoid the necessity of a separate subdivision of this chapter.

acts which show a clear intention to dedicate the land to the public use will be sufficient.¹ A highway may also be created by custom, as from long use by the public, although there had been no dedication by the owner.² To make the dedication complete and binding upon the public, there must be an acceptance of the same. But continued use of the land in conformity with the dedication will be sufficient evidence of acceptance. A *formal* acceptance is not necessary.³

§ 612. **Light and air.**—There may, like a right of way, be an easement in the light and air coming from over the land of an adjacent owner, which would prevent its obstruction by any erections upon the adjoining land near the boundary line. Thus, the owner of a house may acquire an easement in the adjoining land to permit the free passage of light and air through his windows. This easement, in its more important features, resembles the right of way, which has been already discussed. It will not, therefore, be necessary to present in detail the law upon the subject. Like the right of way, the owner of the dominant estate cannot do anything which will increase the burden upon the ser-

¹ *Pope v. Town of Union*, 18 N. J. Eq. 282; *Hawley v. City of Baltimore*, 33 Md. 270; *Mayor, etc., of Macon v. Francklin*, 12 Ga. 239; *Haynes v. Thomas*, 7 Ind. 38; *Trickey v. Schlader*, 52 Ill. 78; *Mo. Inst. for Blind v. How*, 27 Mo. 211; *Buchanan v. Curtis*, 25 Wis. 99; 3 Am. Rep. 23.

² *Holt v. Sargent*, 15 Gray, 97; *Compton's Petition*, 41 N. H. 197; *Hughes v. Providence & Worcester R. R.*, 2 R. I. 493; *Devenpeck v. Lambert*, 44 Barb. 596; *Holcraft v. King*, 25 Ind. 352; *Louk v. Woods*, 15 Ill. 256; *Lewiston v. Proctor*, 27 Ill. 414; *Lemon v. Hayden*, 13 Miss. 159; *Parrish v. Stevens*, 1 Oreg. 59.

³ *Muzzey v. Davis*, 54 Me. 361; *Cole v. Sprowle*, 35 Me. 161; *Remington v. Millard*, 1 R. I. 93; *State v. Atherton*, 16 N. H. 203; *Stevens v. Nashua*, 46 N. H. 192; *Dodge v. Stacey*, 39 Vt. 558; *Curtis v. Hoyt*, 19 Conn. 154; *Requa v. City of Rochester*, 45 N. Y. 129; 6 Am. Rep. 52; *Pope v. Town of Union*, 18 N. J. Eq. 282; *Beach v. Frankenberger*, 4 W. Va. 712; *Day v. Allender*, 22 Md. 511; *State v. Carner*, 5 Strobb. 217; *New Orleans, etc., R. R. v. Moye*, 39 Miss. 374; *Pickett v. Brown*, 18 La. An. 560; *Gentleman v. Soule*, 32 Ill. 271; *Rees v. Chicago*, 38 Ill. 322; *Manderschid v. Dubuque*, 29 Iowa, 73; *Barreau v. West*, 23 Wis. 416; *Buchanan v. Curtis*, 25 Wis. 99; 3 Am. Rep. 23.

vient estate. Any act, such as closing windows and opening new ones, increasing the size of the windows, or removing the house, which operates in changing or increasing the burden upon the servient estate, will destroy the easement.¹

§ 613. **How acquired.** — In England an easement of light and air may be, and is generally, acquired by prescription or long user. An uninterrupted enjoyment of twenty years will be sufficient to create the easement. It is necessary, however, that there should be a building, for the benefit of which the easement is acquired. There can be no such easement in favor of an open lot. The extent of the easement, therefore, depends upon the amount of enjoyment derived from it during the period of prescription.² During the period of prescription the right is *inchoate*, and may be defeated by the erection on the adjacent land of any structure which will exclude the light and air, and interrupt the adverse enjoyment. The owner of the adjoining land cannot be prevented from imposing such barriers to the acquisition of the easement.³ In this country the right to acquire the easement by prescription has not met with general recognition. On the contrary, the tendency is to deny the right altogether. At the present day the courts of New Jersey, Illinois, and Louisiana are the only ones which still uphold this doctrine,⁴ while it is repudiated by the other

¹ Luttrell's Case, 4 Rep. 87; Tud. Ld. Cas. 132, 133; Cherrington v. Abney Mill, 2 Vern. 646; Moore v. Rawson, 3 B. & C. 332; Blanchard v. Bridges, 4 A. & E. 176.

² Martin v. Goble, 1 Comp. 322; Moore v. Rawson, 3 B. & C. 332; Clark v. Clark, L. R. 1 Ch. 16; Roberts v. Macord, 1 Mo. & Rob. 230.

³ Smith v. Kendrick, 7 C. B. 515, 565; Moore v. Rawson, 3 B. & C. 332; Chandler v. Thompson, 3 Camp. 82; Pierce v. Fernald, 26 Me. 436; Dyer v. Sanford, 9 Mete. 395; Ray v. Lynes, 10 Ala. 63.

⁴ Robeson v. Pittenger, 2 N. J. Eq. 57; Durel v. Boisblanc, 1 La. An. 407; Gerber v. Grubell, 16 Ill. 217.

courts.¹ It is possible, however, although very unusual, to acquire a right to the easement of light and air by express grant in any State, and the same rules of construction are applied to them which govern in cases of such prescriptive rights under the English law.²

§ 614. **Right of water.** — Where a stream of water passes over the lands of two or more adjacent owners, it has been established, upon the doctrine of law that there can be no right of property in water except as to its use, that the adjacent owners have mutual easements upon the soil of each other for the free and unrestricted flow of the water. This rule, however, applies in its full force only to the natural streams. The riparian owners have the right to use the water to a reasonable extent, but cannot so use it as to di-

¹ *Collier v. Pierce*, 6 Gray, 18; *Rogers v. Sawin*, 10 Gray, 376; *Carrig v. Dee*, 14 Gray, 583; *Paine v. Boston*, 4 Allen, 169; *Keats v. Hugo*, 115 Mass. 204; 15 Am. Rep. 80; *Mahan v. Brown*, 13 Wend. 263; *Banks v. Am. Tract. Soc.*, 4 Sandf. Ch. 438; *Parker v. Foote*, 19 Wend. 309; *Pierce v. Fernald*, 26 Me. 436; *Ingraham v. Hutchinson*, 2 Conn. 597; *Hubbard v. Town*, 33 Vt. 295; *Haverstick v. Sipe*, 33 Pa. St. 368; *Hoy v. Sterritt*, 2 Watts, 331; *Cherry v. Stein*, 11 Md. 1, overruling *Wright v. Freeman*, 5 H. & John. 477; *Napier v. Bulwinkle*, 5 Rich. 311, overruling *McCready v. Thompson*, Dudley, 131; *Turner v. Thompson*, 58 Ga. 268; 24 Am. Rep. 497; *Ward v. Neal*, 37 Ala. 501, overruling *Ray v. Lynes*, 10 Ala. 63; *Mullen v. Stricker*, 19 Ohio St. 135; 2 Am. Rep. 379; *Morrison v. Marquardt*, 24 Iowa, 35. In some of the States it is held that, where one person owns two contiguous lots, and sells one of them, which has a building on it with windows opening on the remaining lot, an easement passes to the grantee to have free passage of light and air over the adjoining lot. *Jones v. Jenkins*, 34 Md. 1; 6 Am. Rep. 1; *Hubbard v. Town*, 33 Vt. 295; *Lampman v. Milks*, 21 N. Y. 505; *Gerber v. Grubell*, 16 Ill. 217. But this rule is repudiated by some of the other courts. *Keats v. Hugo*, 115 Mass. 204; 15 Am. Rep. 80; *Haverstick v. Sipe*, 33 Pa. St. 368; *Mullen v. Stricker*, 19 Ohio St. 135; 2 Am. Rep. 379; *Morrison v. Marquardt*, 24 Iowa, 35. Perhaps the better rule is, that such an easement will be implied from the existence of windows overlooking the other lot of the grantor, only when it is really necessary to the enjoyment of the estate granted. *Powell v. Simmes*, 5 W. Va. 1; 13 Am. Rep. 629; *Turner v. Thompson*, 58 Ga. 268; 24 Am. Rep. 497.

² *Mahan v. Brown*, 13 Wend. 263; *McCready v. Thompson*, Dudley (S. C.), 113. See also cases cited in preceding note.

minish the flow, corrupt the water,¹ or to dam it up, and cause an overflow of the land above to diminish the volume of the stream below.² The stream cannot be diverted from its regular course, if by so doing injury results to the owners above or below.³ To what extent the water may be used by a riparian owner depends upon the circumstances of each case. And the only general rule which can be stated is, that it must not be so used as to produce a perceptible damage to the other proprietors.⁴ The detention of water, if it is for a reasonable use, will not be actionable, even though it may cause injury to the proprietors below. But if the

¹ *Washburn v. Gilman*, 64 Me. 163; 18 Am. Rep. 246; *Richmond Manuf. Co. v. Atlantic DeLaine Co.*, 10 R. I. 106; 14 Am. Rep. 658; *Jacobs v. Allard*, 42 Vt. 303; 1 Am. Rep. 331. But pollution of the water of a stream by the sewage is not actionable against the city, unless the pollution results from a negligent construction or use of the sewers. The city is not responsible in damages, if it is the result of a defective plan of sewerage. *Merrifield v. City of Worcester*, 110 Mass. 211; 14 Am. Rep. 592.

² *Sampson v. Hoddinott*, 1 C. B. (N. S.) 590; *Colburn v. Richards*, 13 Mass. 420; *Anthony v. Lapham*, 5 Pick. 175. And where the erection of a dam is authorized by legislative enactment, the owner of the dam must make compensation to all riparian proprietors, who have been injured thereby. *Lee v. Pembroke Iron Co.*, 57 Me. 481; 2 Am. Rep. 59; *Gray v. Harris*, 107 Mass. 492; 9 Am. Rep. 61; *Proctor v. Jennings*, 6 Nev. 83; 3 Am. Rep. 240.

³ *Elliott v. Fitchburg R. R. Co.*, 10 Cush. 191; *Macomber v. Godfrey*, 108 Mass. 219; 11 Am. Rep. 349; *Tuthill v. Scott*, 43 Vt. 525; 5 Am. Rep. 301. Water may be diverted from the channel for any reasonable use, but it can only be detained as long as it is necessary and reasonable, and it must be returned to the channel, before it passes to the land of the riparian proprietor below. *Clinton v. Myers*, 46 N. Y. 511; 7 Am. Rep. 373; *Arnold v. Foot*, 12 Wend. 330; *Miller v. Miller*, 9 Pa. St. 74; *Pool v. Lewis*, 46 Ga. 162; 5 Am. Rep. 526.

⁴ *Mason v. Hill*, 5 B. & Ald. 1; *Embrey v. Owen*, 6 Exch. 353; *Blanchard v. Baker*, 8 Me. 253; *Gerrish v. Brown*, 51 Me. 256; *Anthony v. Lapham*, 5 Pick. 175; *Merrifield v. Lombard*, 13 Allen, 16; *Weston v. Alden*, 8 Mass. 136; *Brace v. Yale*, 97 Mass. 18; *Merritt v. Brinkerhoff*, 17 Johns. 306; *Pollitt v. Long*, 58 Barb. 20; *Arnold v. Foote*, 12 Wend. 330; *Clinton v. Myers*, 46 N. Y. 511; 7 Am. Rep. 373; *Jacobs v. Allard*, 42 Vt. 303; 1 Am. Rep. 331; *Howell v. McCoy*, 3 Rawle, 256; *Miller v. Miller*, 9 Pa. St. 74; *Webb v. Portland Co.*, 3 Sumn. 189; *Holeman v. Boiling Spring Co.*, 14 N. J. Eq. 335; *Dumont v. Kellogg*, 29 Mich. 420; 18 Am. Rep. 102.

use be an unusual one, then it is not likely that the rule would apply.¹ This rule is well established in favor of mill owners, the working of whose mills by the water prevents its use for a similar purpose by a riparian proprietor below. The right to run a mill in such cases, and to dam up the water for that purpose, depends upon the priority of establishment. He who first creates a mill upon the banks of the stream obtains a prior right to the use of the stream for that purpose, and if the quantity of water is not sufficiently large to permit the running of more than one mill, no other mill can be erected. If a second mill is erected by a proprietor above, and the diversion and detention of water for the purposes of the mill are so great as to diminish materially the supply of water to the first mill, the owner of the latter can enjoin such detention or diversion of the water.² The mill owner cannot, under any circumstances, so dam up the water as to cause it to overflow the land above, or to divert it from the proprietor below, although in some States by statute mill owners are permitted to inflict such injury upon the adjoining proprietors by the payment of compensation in the way of damages, the assessment and recovery of which are regulated by the statutes.³

§ 615. **Percolations and swamps.**—The above statements are only applicable to what are known in the law as natural water courses. There must be a regular stream flowing in a regular channel, whether on the surface or

¹ *Springfield v. Harris*, 4 Allen, 494; *Gould v. Boston Duck Co.*, 13 Gray, 443; *Clinton v. Myers*, 46 N. Y. 511; 7 Am. Rep. 373; *Pool v. Lewis*, 41 Ga. 162; 5 Am. Rep. 526.

² *Liggins v. Inge*, 7 Bing. 682; *Mason v. Hill*, 5 B. & Ad. 1; *Williams v. Moreland*, 2 B. & C. 910; *Bealey v. Shaw*, 6 East, 209; Ang. on Wat. Cour. sects. 130, 135; *Carey v. Daniels*, 8 Metc. 466; *Calnont v. Whitaker*, 3 Rawle, 84.

³ Washb. on Ease., ch. 3, sect. 5, pl. 35-46; Ang. Wat. Cour., sect. 482.

under ground, in order that such rights may be claimed in it. If the water constituted a swamp upon the adjacent land, which flowed in no fixed channel, or if it percolated through the soil from one tract of land to another, the rules enunciated in the preceding paragraph do not apply. The owner of the land may draw off the water from the swamp, or divert the percolation, so as to collect the water in a well upon his own land, notwithstanding it results in serious detriment to the adjacent proprietor. But if the owner of the land is actuated by malice, as where he pollutes the water, or cuts off the underground current, simply for the purpose of rendering his neighbor's well useless, an action would lie for the damage thus inflicted.¹ And in draining one's land of surface water, no action will lie if it be allowed to flow over the adjoining land through natural channels. On the other hand, the owner of the adjoining land may prevent such overflow of his land by the erection of barriers, or by the use of any other suitable means.² But in the drainage of one's land it is not permissible to direct the flow of the

¹ *Rawstron v. Taylor*, 11 Exch. 369; *Dudden v. Guardians, etc.*, 1 H. & N. 627; *Morton v. Scholefield*, 9 Mees. & W. 665; *Chasemore v. Richards*, 5 H. & N. 982; *Dickinson v. Canal Co.*, 7 Exch. 300; *Hodgkinson v. Ennor*, 4 B. & S. 229; *Smith v. Kendrick*, 7 C. B. 566; *Acton v. Blundell*, 12 Mees. & W. 324; *Chase v. Silverstone*, 62 Me. 475; 16 Am. Rep. 419; *Greenleaf v. Francis*, 18 Pick. 117; *Luther v. Winnisimett Co.*, 9 Cush. 171; *Parker v. Boston & M. R. R.*, 3 Cush. 107; *Wilson v. City of Bedford*, 108 Mass. 261; 11 Am. Rep. 352; *Roath v. Driscoll*, 20 Conn. 533; *Brown v. Illins*, 25 Conn. 583; *Village of Delphi v. Youmans*, 45 N. Y. 362; 6 Am. Rep. 100; *Ellis v. Duncan*, 21 Barb. 230; *Smith v. Adams*, 6 Paige Ch. 435; *Radeliffe v. Mayor, etc.*, 4 N. Y. 200; *Wheatley v. Baugh*, 25 Pa. St. 523; *Clark v. Lawrence*, 6 Jones Eq. 783; *Frazier v. Brown*, 12 Ohio, 311; *Hanson v. McCue*, 42 Cal. 303; 10 Am. Rep. 299; *Hougan v. Milwaukee, etc., R. R.*, 35 Iowa, 558; 14 Am. Rep., 502.

² *Greeley v. Maine Cent. R. R.*, 53 Me. 200; *Gannon v. Hagadon*, 10 Allen, 106; *Parks v. Newburyport*, 16 Gray, 29; *Swett v. Cutts*, 50 N. H. 439; 9 Am. Rep. 276; *Goodale v. Tuttle*, 29 N. Y. 459; *Bowlsby v. Speer*, 31 N. J. L. 351; *Hoyt v. Hudson*, 27 Wis. 656. *Contra*, if it does injury; *Gerrish v. Clough*, 48 N. H. 9; 2 Am. Rep. 165; *Ogburn v. Connor*, 46 Cal. 346; 13 Am. Rep. 213.

water upon the adjoining land by the construction of a drain or ditch. Still, it is permissible by the use of such means to empty the water into a natural stream, and if the volume of the stream is thereby increased to such an extent as to cause damage to the riparian owners below, they are without remedy.¹

§ 616. **Artificial water courses.**—The rule is also different where the water course is artificial. No one has the right to establish an artificial water course upon the land of another; but if the latter permits its construction he acquires no easement in the water, and cannot compel its perpetual maintenance, whatever injury he might suffer from its discontinuance. An uninterrupted enjoyment of the artificial water course for twenty years will not give him such a right. The construction of the water course being only for certain purposes, the adjoining owner could not by mere enjoyment acquire a prescriptive right to its continuance. He who creates the artificial stream may stop or divert it when he pleases, but at the same time he cannot maliciously foul the water to the detriment of the riparian owners below.²

§ 617. **Easements in water courses.**—The various rights so far mentioned are natural rights incident to riparian ownership, implied or established by law. These rights are enjoyed independent of any contract or grant. But it is manifest that an express grant may operate in enlarging, diminishing or altogether extinguishing, the natural rights.

¹ *Dickinson v. Worcester*, 7 Allen, 19; *Waffle v. N. Y. Central R. R.*, 53 N. Y. 11; 13 Am. Rep. 467; *Miller v. Laubach*, 47 Pa. St. 154; *Butler v. Peck*, 16 Ohio St. 334; *Pettigrew v. Evansville*, 25 Wis. 223; 3 Am. Rep. 50; *Smith v. Kendrick*, 7 C. B. 515.

² *Arkwright v. Gell*, 5 Mees. & W. 203; *Mayor v. Chadwick*, 11 A. & E. 571; *Elliott v. Northeastern Railway Co.*, 10 H. L. Cas. 333; *Beaston v. Weate*, 5 E. & B. 986; *Wright v. Williams*, 1 Mees. & W. 77; *Saunders v. Newman*, 1 B. & Ald. 258; *Napier v. Bulwinkle*, 5 Rich. 317.

They may be varied, and new rights may be acquired by prescription or grant. An express grant or prescription will alter the natural or common-law rights of the riparian owners in the same manner as the creation of express and special easements affects the rights of property in other cases.¹ Where special rights are acquired in a stream of water by grant, the owner of the dominant estate or grantee has no right to make such use of the water as will inflict greater injury upon the other riparian owners than is expressly permitted by the terms of the grant. And the right acquired by prescription cannot in the same way be enlarged or extended.² Where one has the right of a watercourse over another's land, he is obliged to keep it in repair, in the absence of covenants imposing that obligation upon the owner of the land, and for that purpose he has the right to enter upon the land to make the repairs, taking care that no unnecessary damage be done to the servient estate.³

§ 618. **Right of lateral and subjacent support.** — As an incident to the right of property in lands, the proprietor cannot make excavations upon his land, which will deprive the adjoining land of that lateral support which is necessary to keep it from falling in.⁴ In the same manner, where

¹ *Manning v. Wasdale*, 5 A. & E. 758; *Stockport Waterworks v. Potter*, 3 H. & C. 300; *s. c.*, 31 L. J. Exch. 9; *Dudley Canal v. Grazebrook*, 1 B. & Ald. 59; *Carlyon v. Lovering*, 1 H. & N. 784; *Goldsmith v. Tunbridge Wells Commissioners*, L. R. 1 Ch. 349; *Crossly v. Lightowler*, L. R. 2 Ch. 479; *Nuttal v. Bracewell*, L. R. 2 Ex. 1; *Cooke v. Hull*, 3 Pick. 269; *Stowell v. Lincoln*, 11 Gray, 434; *Watkins v. Peck*, 13 N. H. 360.

² *Sampson v. Hoddinott*, 1 C. B. (N. S.) 590; *Bickett v. Morris*, L. R. 1 H. L. Cas. 47; *Northam v. Hurley*, 1 E. & B. 665; *Embrey v. Owen*, 6 Exch. 353; *Jennison v. Walker*, 11 Gray, 423.

³ *Peter v. Daniel*, C. B. 568; *Prescott v. White*, 21 Pick. 341.

⁴ *Partridge v. Scott*, 3 Mees. & W. 220; *Humphries v. Brogden*, 12 Q. B. 743; *Bibby v. Carter*, 4 H. & N. 153; *Wyatt v. Harrison*, 3 B. & Ad. 871; *Backhouse v. Bonomi*, 9 H. L. Cas. 503; *Elliott v. Northeastern Railway*, 10 H. L. Cas. 333; *Thurston v. Hancock*, 12 Mass. 220; *Collender v. Marsh*, 1 Pick. 418; *Foley v. Wyeth*, 2 Allen 131; *Panton v. Holland*, 17 Johns. 92; *Lasala*

there is a separate ownership in the surface, and the mines beneath, the owner of the mines cannot by working them so weaken the subjacent support to the surface as to cause it to cave in.¹ These are natural rights of easements, which are independent of any covenant or grant. They extend, however, only to the support of the adjoining land or surface in its natural condition. If the burden of support is increased by the erection of buildings upon the land, and it is because of such increase that the excavation has caused the injury to the adjacent owner, he is without remedy. He had no natural easement upon the land of his neighbor for the support of his buildings. Such is also the rule where in the case of mines the erection of the buildings causes the surface to give way.² But if the excavation is made in a negligent or unskilful manner, and the damage results from negligence or unskilfulness, and not from the increase of the burden by the erection of the house, an action will lie for the injury thus sustained.³ The English courts, however, deny the right to an action in such a case, if injury would not have resulted from the negligence, had there been no building or other superstructure upon the

v. Holbrook, 4 Paige Ch. 169; *Hay v. The Cohoes Co.*, 2 N. Y. 162; *Austin v. Hudson River R. R. Co.*, 25 N. Y. 334; *Richardson v. Vermont Central R. R.*, 25 Vt. 465; *Beard v. Murphy*, 37 Vt. 101; *McGuire v. Grant*, 25 N. J. L. 356; *Charless v. Rankin*, 22 Mo. 566.

¹ *Humphries v. Brogden*, 12 Q. B. 739; *Smart v. Morton*, 5 E. & B. 30; *Rowbotham v. Wilson*, 8 E. & B. 123; *Harris v. Ryding*, 5 Mees. & W. 60; *Micklin v. Williams*, 12 Exch. 259; *Jones v. Wagner*, 66 Pa. St. 429; 5 Am. Rep. 385.

² *Rogers v. Taylor*, 2 H. & N. 828; *Palmer v. Fleshees*, 1 Sid. 167; *Gayford v. Nichols*, 9 Exch. 702; *Thurston v. Hancock*, 12 Mass. 220; *Lasala v. Holbrook*, 4 Paige Ch. 169; *McGuire v. Grant*, 25 N. J. L. 356; *Napier v. Bulwinkle*, 5 Rich. 311; *Charless v. Rankin*, 22 Mo. 566.

³ *Foley v. Wyeth*, 2 Allen 131; *Richardson v. Vermont Cent. R. R.*, 25 Vt. 465; *Panton v. Holland*, 17 Johns. 92; *Austin v. Hudson River R. R.*, 25 N. Y. 338; *McGuire v. Grant*, 25 N. J. L. 356; *Shrieve v. Stokes*, 8 B. Mon. 453; *Charless v. Rankin*, 22 Mo. 573.

land.¹ But these natural rights may be enlarged or diminished by express grant, or entirely new rights may be acquired by prescription. Thus a house may have annexed to it by grant or prescription an easement for lateral or subjacent support on the adjacent or underlying property of another, which cannot be claimed as a natural incident of the right of property. On the other hand, the right to such a support may be surrendered altogether.²

§ 619. **Implied grant of lateral support.** — Another exception to the general rule arises where the owner of two adjoining lots conveys one with a building thereon; he cannot by excavations on the other lot deprive the building of the requisite support. The grant of an easement for lateral support is implied from his conveyance of the lot and building. He will not be permitted to do anything upon the remaining lot which will detract from its full enjoyment.³ The same rule applies when adjacent houses rely for lateral support upon the walls of each other, as where houses are built in a block, and the walls between them mutually support each other. If one man erects the block, and afterwards sells one or more of the houses, an easement for support arises in favor of the owners of the several houses. This easement may also be acquired by express grant in all cases where it will not be implied.⁴

¹ *Smith v. Thackerah*, L. R. 1 C. B. 564; *Brown v. Robins*, 4 H. & N. 186; *Strogan v. Knowles*, 6 H. & N. 454; *Backhouse v. Bonomi*, 9 H. L. Cas. 503.

² *Rogers v. Taylor*, 2 H. & M. 828; *Wyatt v. Harrison*, 3 B. & Ad. 817; *Hyde v. Thornburgh*, 2 Car. & K. 250; *Dodd v. Holme*, 1 A. & E. 493; *Partridge v. Scott*, 3 Mees. & W. 220; *Lasala v. Holbrook*, 4 Paige Ch. 169; *Richart v. Scott*, 7 Watts, 460. It has been held in Georgia that the right to lateral support for a building cannot be acquired by prescription. *Mitchell v. Mayor*, 49 Ga. 19; 15 Am. Rep. 469.

³ *Brown v. Windsor*, 1 C. & J. 20; *Richards v. Rose*, Ex. Ch. 218; *Humphries v. Brogden*, 12 Q. B. 743; *Palmer v. Fleshees*, 1 Sid. 167; *United States v. Appleton*, 1 Sumn. 492; *Lasala v. Holbrook*, 4 Paige Ch. 169; *Eno v. Del Vecchio*, 4 Duer, 53; *McGuire v. Grant*, 25 N. J. L. 356.

⁴ *Solomon v. Vintner's Co.*, 4 H. & N. 598; *Walters v. Pfeil*, Mood. & M. 362; *Peyton v. Mayor of London*, 9 B. & C. 725; *Massey v. Goyder*, 46 & P.

§ 620. **Party walls.** — Rights similar to lateral support are acquired by the erection of the so-called party walls. A party wall is one which is erected between two lots for the common benefit of the owners thereof in supporting the beams of their adjoining buildings. They are not tenants in common of the entire wall. Each has the title in severalty to one-half, with an easement for support in the other half. Each of the owners can do whatever he pleases with his own half, provided he does not weaken the support of the other half. And if he tears down his half he does it at the risk of rendering himself liable for any injuries sustained by the remaining portion of the wall.¹ But it is not every wall which is common between two houses that has the characteristics of a party wall. But every such wall by constant use as a common wall for twenty years will become a party wall by prescription.² Party walls are generally erected by express agreement between the parties, each paying his share of the expenses. The mere erection by one of a common wall between them will not subject the other to liability for one-half the expenses of erection, even though he derives as much benefit therefrom as the one who caused its erection.³ Party walls are generally, though not

161; *Richards v. Rose*, 24 Eng. L. & Eq. 406, s. c., 9 Ex. Ch. 218; *Eno v. Del Vecchio*, 4 Duer, 53; *Webster v. Stevens*, 5 Duer, 553; *Napier v. Bulwinkle*, 5 Rich. 311.

¹ *Matts v. Hawkins*, 5 Taunt. 20; *Sherred v. Cisco*, 4 Sandf. 480; *Dubois v. Beaver*, 25 N. Y. 127; *Brooks v. Curtis*, 50 N. Y. 639; 10 Am. Rep. 545; *Orman v. Day*, 5 Fla. 385.

² *Eno v. Del Vecchio*, 4 Duer, 53; *Dowling v. Hennings*, 20 Md. 179. But see *Mitchell v. Mayor*, 49 Ga. 19; 15 Am. Rep. 669; *Napier v. Bulwinkle*, 5 Rich. 311.

³ *Richardson v. Tobey*, 121 Mass. 457; 23 Am. Rep. 283; *Sherred v. Cisco*, 4 Sandf. 480; *Dole v. Hughes*, 54 N. Y. 444; 13 Am. Rep. 611; *Orman v. Day*, 5 Fla. 385. And one part owner of a party wall may be sued on his contract or covenant for his share of the expenses. *Day v. Caton* 115 Mass. 513; 20 Am. Rep. 347; *Rindge v. Baker*, 57 N. Y. 207; 15 Am. Rep. 475. But a covenant to build a party wall is executory and personal in its nature, and does not run with the land so as to bind the assigns of the covenantor. *Cole v. Hughes*, 54 N. Y. 444; 13 Am. Rep. 611.

necessarily, erected one-half on each of the contiguous estates.¹

§ 621. **Double ownership in buildings — Subjacent support.** — Where there is a separate ownership in the upper or lower half of a house, similar easements of support are enjoyed by the respective owners. The owner of the upper half is entitled to the subjacent support from the lower half, and the owner of the lower half has an easement in the upper half, the roof, etc., for protection from rain and other elements. The law is not very clear as to the obligations of the owners to each other. Without doubt one cannot do any affirmative act to his half which will result in damage to the other. But whether he is under a legal obligation to keep his half in repair for the benefit of the other is not well settled,² although that would seem to be a just and equitable doctrine. If there is no such obligation to repair, the owner of the other half has the right to enter and make the repairs himself. There seems also to be a tendency to adopt the French rule, making all expenses for repair a common charge upon all the owners.³ But it will require further adjudication in order to settle the rights and obligations of these parties.

¹ See *Cubitt v. Porter*, 8 B. & C. 257; *Wiltshire v. Sidford*, 8 B. & C. 259; *Bradley v. Christ's Hospital*, 4 Mann. & G. 761; *Brondage v. Warner*, 2 Hill, 145; *Partridge v. Gilbert*, 15 N. Y. 601; *Evans v. Jayne*, 23 Pa. St. 36; *Dowling v. Hennings*, 20 Md. 179.

² The authorities generally deny the right of action. *Calvert v. Aldrich*, 99 Mass. 74; *Pierce v. Dyer*, 109 Mass. 374; 12 Am. Rep. 716; *Cheeseborough v. Green*, 10 Conn. 318. But if the owner of the upper half repairs the roof, he bears the whole expenses, and cannot compel the owner of the other half to pay any proportion of it. *Ottumwa Lodge v. Lewis*, 34 Iowa, 67; 11 Am. Rep. 135. See also *Graves v. Berdan*, 26 N. Y. 501; *Cheeseborough v. Green*, 10 Conn. 318; *McCormick v. Bishop*, 28 Iowa, 239.

³ *Campbell v. Mesier*, 4 Johns. Ch. 334. *Contra*, *Ottumwa Lodge v. Lewis*, 34 Iowa, 67; 11 Am. Rep. 135. And see *Graves v. Berdan*, 26 N. Y. 501; *Cheeseborough v. Green*, 10 Conn. 318; *McCormick v. Bishop*, 28 Iowa, 239.

§ 622. **Legalized nuisances.** — Where one acquires from the owners of the land in the neighborhood by grant or prescription the right to do things which without such license would be a nuisance, and for which an action would lie, he is said to have acquired an easement in the lands to commit the nuisance, free from liability for the consequences. Such is very often the case with noisome or offensive trades. The trade must, however, be lawful, and likely to be productive of benefit to the public, in order that the easement may bind the owners of the neighboring land. And a nuisance, legalized in this manner, must be kept strictly within the conditions upon which the right was acquired. The licensee will not be permitted to increase the nuisance, or to establish a new one in its place, and the right must be exercised with the least possible discomfort or annoyance to the owners of the adjoining lands.¹

¹ Aldred's Case, 9 Rep. 59 a; *Cole v. Barlow*, 4 C. & B., (n. s.) 434; *Baxendale v. McMurray*, L. R. 2 Ch. 790; *Elliotson v. Feetham*, 2 Bing. N. C. 134; *Bower v. Hill*, *Ib.* 339; *St. Helen's Smelting Co. v. Tipping*, 11 H. L. Cas. 642; *Dana v. Valentine*, 5 Metc. 8; *Atwater v. Bodfish*, 11 Gray 152; *Holeman v. Boiling Spring Co.*, 14 N. J. Eq. 346.

SECTION III.

FRANCHISES.

SECTION 633. Definition.

634. Kinds of franchises.

635. Mutual obligations.

636. Conflicting franchises — Constitutional prohibition.

§ 633. **Definition.** — A franchise is a privilege granted by the government to individuals which is not enjoyed by, and do not belong in common to, the people of a country. In England it is conferred by letters patent from the crown, and in this country by grants from the legislative department of the government. It is a privilege which is granted because it is calculated to promote the public benefit, while at the same time it affords a source of revenue to those who engage in its exercise.¹ A franchise is generally, but not necessarily, granted to a corporation. Individuals may possess it, but it is usually of such a nature that it is easier and more convenient for corporations to exercise it. It is an estate of inheritance, unless its enjoyment is limited to a specific period, and is inheritable.² It can be aliened, and may be sold to satisfy the debts of the corporation or the individuals who own it.³ The franchise is to be distinguished from the charter of the corporation which owns it, although the franchise is often granted in the same act which contains

¹ Bk. of *Augusta v. Earle*, 13 Pet. 519; 2 Bla. Com. 37; Ang. & Ames, on Corp., sect., 737; *People v. Utica Ins. Co.*, 15 Johns. 358. In England franchises are now granted by the Legislature, instead of by the crown as formerly. 1 Cool. Bla. Com. 274, n.

² 3 Kent's Com. 459; 2 Washb. on Real Prop. 291; *Chadwick v. Haverhill Bridge*, 2 Dane Abr. 686; *Stark v. McGowen*, 1 Nott & M. 393; *Clark v. White*, 5 Bush, 353.

³ 2 Washb. on Real Prop. 297.

the charter. Thus, in the case of a railroad company, the franchise of the road may be sold to satisfy debts, but the charter does not pass with it.

§ 634. **Kinds of franchises.** — There are as many kinds of franchises as there may be privileges granted by the government. The most common are ferries, bridges, turnpike roads, and railroads. A ferry is the right to conduct passengers and freight by boat across a navigable stream between two points on the opposite banks. The right to a ferry does not depend upon the proprietorship of the water, or of the banks. Neither gives the right to set up a ferry, nor does the grant of a ferry interfere with the general navigation of the stream.¹ In the same manner is the right to construct a bridge across a stream, or to build a railroad or turnpike, a privilege, and not a common right which may be enjoyed by any one.²

§ 635. **Mutual obligations.** — In the grant of a franchise, mutual obligations are assumed by the government and the individuals or corporation who receive it. The government confers upon the latter the right to exercise the right of *eminent domain* over private property, so far as it is necessary for the enjoyment of the franchise, and the further right to provide for its own compensation, by charging a toll to all persons who make use of the benefits thus provided. On the other hand, the corporation undertakes to provide for the public safe and convenient accommodations, and for any failure to carry

¹ *Peter v. Kendall*, 6 B. & C. 703; *Fay, Petitioner*, 15 Pick. 243; *Mills v. County Commissioners*, 4 Ill. 533; *McRoberts v. Washburn*, 10 Minn. 27; *Fall v. County Sutter*, 21 Cal. 252.

² *Beckman v. Saratoga, etc.*, R. R., 3 Paige Ch. 45; *Bloodgood v. Mohawk Railroad*, 18 Wend. 9; *Milhan v. Sharp*, 27 N. Y. 619; *Davis v. Mayor, etc.*, 14 N. Y. 506; *Bush v. Peru Bridge Co.*, 3 Ind. 21; *McRoberts v. Washburn*, 10 Minn. 27.

out its part of the contract it is liable to any person who may be injured thereby, and it may lose its franchise by forfeiture to the State. The franchise is forfeited only at the suit of the government, by a judgment in a proceeding of *scire facias* or *quo warranto*.¹

§ 636. **Conflicting franchises — Constitutional prohibition.** — If the government, in granting a franchise, obligates itself not to grant a similar franchise to be exercised in the same neighborhood, or between the same points, any subsequent franchise would be void, under the provision of the United States Constitution, which prohibits a State from passing any law impairing the obligation of a contract.² But if there is no express restriction of that kind, none will be implied. And the grant of a second franchise would be good, even though its exercise would render the first altogether valueless.³ A franchise is not necessarily a monopoly. And even when there is such a restriction, the State is not prohibited from destroying the first franchise by the grant of a second, under the doctrine of *eminent domain*, whenever the public wants require such a forfeiture. In such a case, however, the owners of the first franchise would be entitled to, and would receive, a proper compensation for

¹ *Peter v. Kendall*, 6 B. & C. 703; *Willoughby v. Horridge*, 12 C. B. 742; *Chadwick v. Haverhill Bridge Co.*, 2 Dane Abr. 683; *Ferrell v. Woodward*, 20 Wis. 461; *McRoberts v. Washburn*, 10 Min. 27; 3 Kent's Com. 458; 2 Washb. on Real Prop. 293.

² *Dartmouth College v. Woodward*, 4 Wheat. 518; *Boston & Lowell R. R. v. Salem & L. R. R.*, 2 Gray, 1; *Newburgh Turnpike Co. v. Miller*, 5 Johns. Ch. 101; *People v. Sturtevant*, 9 N. Y. 273; *Milhan v. Sharp*, 27 N. Y., 620; *McRoberts v. Washburn*, 10 Minn. 29.

³ *Charles River Bridge Co. v. Warren River Bridge Co.*, 7 Pick. 344; *s. c.*, 11 Pet. 429; *Richmond R. R. Co. v. Louisa R. R. Co.*, 13 How. 71; *Mills v. St. Clair Co.*, 8 How. 581; *Piscataqua Bridge Co. v. New Hampshire Bridge Co.*, 7 N. H. 59; *Mohawk Bridge Co. v. Utica R. R. Co.*, 6 Paige Ch. 554; *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 61; *Bush v. Peru Bridge Co.*, 3 Ind. 21; *McRoberts v. Washburn*, 10 Minn. 28; *Fall v. County Sutter*, 21 Cal. 252.

such loss. A franchise is just as much subject to the exercise of eminent domain, under similar restrictions as to compensation, as any other kind of private property.¹ If, however, private persons attempt, without a franchise, to exercise the same rights as are granted by the franchise, to the prejudice of the owners of the franchise, such an interference would be considered a nuisance, which will be abated and damages awarded upon proper application to the courts.²

¹ *West River Bridge Co. v. Dix*, 6 How. 507; *Richmond R. R. Co. v. Louisa R. R. Co.*, 13 How. 71; *Boston Water Power Co. v. Boston & W. R. R. Co.*, 23 Pick. 360; *Boston & Lowell R. R. v. Salem & L. R. R.*, 2 Gray, 1; *Central Bridge Co. v. Lowell*, 4 Gray, 474; *White River Turnpike Co. v. Vermont Cent. R. R.*, 21 Vt. 590; *New York, etc., R. R. v. Boston, etc., R. R.*, 36 Conn. 196; *Matter of Kerr*, 42 Barb. 119; *McRoberts v. Washburn*, 10 Minn. 27.

² 2 Bla. Com. 219; 2 Washb. on Real Prop. 294; *Ogden v. Gibbons*, 4 Johns. Ch. 150; *Newburgh Turnpike Co. v. Miller*, 5 Johns. Ch. 101; *McRoberts v. Washburne*, 10 Minn. 27; *Fall v. County Sutter*, 21 Cal. 252.

SECTION IV.

RENTS.

SECTION 641. Rents defined.

642. Rent-service.

643. Rent-charge and rent-seck — Fee farm rents.

644. How created.

545. How extinguished or apportioned.

646. Remedies for the recovery of the rent.

§ 641. **Rents defined.** — A rent, according to Mr. Washburn, “is a right to the periodical receipt of money or money’s worth in respect of lands, which are held in possession, reversion or remainder, by him from whom the payment is due.”¹ It is, in other words, a right to the payment of something out of the profits of lands, to be rendered by the owner thereof and his privies. At common law there were three kinds of rents, viz.: *Rent service*, *rent seck* and *rent charge*.

§ 642. **Rent service.** — A *rent service* is that which the owner of a feud reserves to himself in conveying a part or the whole of his estate therein, to be paid by the grantee. In every such conveyance there was a tenure existing between grantor and grantee even of the fee, and out of this tenure, and as an incident thereof, whenever there was a rent reserved the owner of the rent had the right to go upon the land and *distrain* the grantee’s goods and chattels, and satisfy himself for the accrued and unpaid rent by a sale thereof. This right of *distress* was enjoyed by the holder of a rent service, without its being expressly reserved. The Statute *Quia Emptores* abolished all tenure between grantors

¹ 2 Washb. on Real Prop. 272; Co. Lit. 142 a.

and grantees of the fee, so that at present a rent service cannot be reserved out of a fee.¹ But this tenure does exist between reversioner or remainder-man, and the tenant of a term of years, and therefore a rent service may be reserved in a lease.²

§ 643. **Rent charge and rent seek — Fee farm rents.** — Rent charge is that, the payment of which is made a charge upon the land, but to which no right of distress was attached, unless expressly granted or reserved. If the owner of the rent was given this right, it was called a rent charge, if he did not possess it, the rent was a mere dry rent, or rent seek, the payment of which cannot be enforced by any seizure of the property out of which it was to issue.³ The characteristics of these two kinds of rents, at present, present no dissimilarity except in the matter of remedies for their enforcement, and are generally known under the common name of *fee-farm rents*, and are thus distinguished from *rents service*.⁴ They will, therefore, be treated together under that common appellation.

§ 644. **How created.** — *Fee-farm* rents are created by any form of conveyance which constitutes a valid transfer of other incorporeal hereditaments. And they may be either reserved by the owner of the land in the deed conveying the land, or granted by him to a stranger, while he retains the land.⁵ It may be granted in fee, in tail, for life

¹ 2 Washb. on Real Prop. 273; 3 Prest. Abst. 54; Van Rensselaer v. Read, 26 N. Y. 563; Wallace v. Harmstad, 44 Pa. St. 495.

² 2 Washb. on Real Prop. 273; Williams on Real Prop. 247. See *ante* sect 192, 193.

³ 3 Prest. Abst. 55; 2 Bla. Com. 42; Williams on Real Prop. 329, 330; 2 Washb. on Real Prop. 273, 274; Cornell v. Lamb, 2 Cow. 652; Van Rensselaer v. Hays, 19 N. Y. 68; Van Rensselaer v. Chadwick, 22 N. Y. 33; Wallace v. Harmstad, 44 Pa. St. 495.

⁴ 3 Prest. Abst. 54; 2 Washb. on Real Prop. 273; Langford v. Selmes, 3 Kay & J. 229; Williams on Real Prop. 333.

⁵ 3 Prest. Abst. 53; 3 Cruise Dig. 273; Williams on Real Prop. 334; Van Rensselaer v. Hays, 19 N. Y. 68; Ingersoll v. Sergeant, 1 Whart. 337.

or for years, and there may be a grant of the rent to one for a particular estate, with a remainder to another.¹ But the rent will be only good so far as the estate of the grantor extends. A tenant for life cannot grant a rent for a longer period than his own life.² Once the rent is created it is itself the subject of a grant or devise, and may be carved up into any number of estates, as long as the fee is not parted with. It descends to the heirs, and is capable of being conveyed to uses and in trust.³ The wife also may have her dower or the husband his curtesy out of a rent held in fee or in tail.⁴ *Fee-farm* rents are not very common in this country. Indeed they are rarely met with in practice. But they are valid limitations, and will receive the same recognition in this country as is accorded to them in England. Whenever used, they are resorted to for the purpose of securing to certain heirs their share in the inheritance without partitioning the land, or for raising jointures for married women.⁵

§ 645. **How extinguished or apportioned.**—If one having a rent-charge acquires by purchase a part of the premises, out of which the rent issues, the rent is wholly extinguished, since a rent-charge is not capable of apportionment. This rule is the result of the repugnance enter-

¹ 2 Washb. on Real Prop. 275; Williams on Real Prop. 334; Van Rensselaer v. Hays, 19 N. Y. 68; Van Rensselaer v. Read, 26 N. Y. 564.

² Williams on Real Prop. 329; 2 Washb. on Real Prop. 277; 2 Dane's Abr. 452.

³ 3 Prest. Abst. 53; 2 Washb. on Real Prop. 276; 3 Cruise Dig. 285, 292; Van Rensselaer v. Hays, 19 N. Y. 68; Van Rensselaer v. Read, 26 N. Y. 564.

⁴ 2 Washb. on Real Prop. 276; 3 Cruise Dig. 291.

⁵ Scott v. Lunt, 7 Pet. 596; Adams v. Bucklin, 7 Pick. 121; Van Rensselaer v. Platner, 2 Johns. Cas. 17; Van Rensselaer v. Hays, 19 N. Y. 68; Van Rensselaer v. Read, 26 N. Y. 564; Williams' Appeal, 47 Pa. St. 290; Farley v. Craig, 11 N. J. L. 262; Wartenby v. Moran, 3 Call, 424; Marshall v. Conrad, 5 Call, 364; Alexander v. Warrance, 17 Mo. 228; Walk. Am. Law, 265; 2 Washb. on Real Prop. 277, 278.

tained at common law to this kind of rent. The rule is the same if he releases any portion of the land from the charge.¹ But the rule is confined to cases of acquisition by purchase. If a portion of the land is acquired by descent, the rent will be apportioned.² The owner of the rent may avoid the operation of this rule by entering into a new agreement with the owner of the land. Thus, if the land is held by tenants in common, in case of partition between them, the owner of the rent may by agreement apportion the rent between them, or he may release a portion of the land with the consent of the other land-owners.³ These agreements, however, would virtually be new grants of rent, and cannot technically be said to secure an apportionment of the old rent. Although there can be no apportionment of rent in case of a release, or transfer to the grantee, of a part of the land charged with the rent, it can be divided up indefinitely by the owner of the rent, and it can be apportioned among the heirs of the grantee at his death, or a part may be severed by levy of execution to satisfy the debts of the grantee.⁴

§ 646. **Remedies for the recovery of the rent.** — The ordinary common-law remedy was that of *distress*. Upon failure to pay the rent, the person entitled to payment could distrain the tenant's personal property found upon the land, out of which the rent issues. This right of distress was invariably an incident to a rent service, but had to be expressly reserved in the case of a rent charge.⁵ In most of the

¹ 2 Washb. on Real Prop. 288; Co. Lit. 148; Williams on Real Prop. 337; *Dennett v. Pass*, 1 Bing. (N. C.) 388; *Parley v. Craig*, 11 N. J. L. 262.

² 2 Washb. on Real Prop. 288; Williams on Real Prop. 337; *Cruger v. McLaury*, 41 N. Y. 223.

³ *Van Rensselaer v. Chadwick*, 22 N. Y. 33; 2 Washb. on Real Prop. 289.

⁴ *Rivin v. Watson*, 5 Mees. & W. 255; *Farley v. Craig*, 11 N. J. L. 262; *Ryerson v. Quackenbush*, 26 N. J. L. 236; *Cook v. Brightly*, 46 Pa. St. 440.

⁵ 2 Washb. on Real Prop. 278; 2 Shars. Bla. Com. 43 n.

States in this country the right of distress has been adopted and enforced, as modified by Stat. 4, Geo. II. ch. 28, which extended it to rents seek and rents charge, thereby abolishing all distinction between them.¹ But it has never existed in New England, and has been abolished in New York and several of the other States.² In addition to the right of distress, there is the ordinary personal action against the tenant and his assigns for the recovery of the rent as it falls due. This remedy always exists together with, or in the absence of, the right of distress.³ In the common-law pleading, the form of action varies with the form of the deed, in which the rent is reserved or granted. If the deed is an indenture, covenant will lie, if a deed poll, *assumpsit* is the proper form of action, while the action of *debt* will lie in most cases, whether the instrument be an indenture or a deed poll.⁴ Sometimes, in the creation of a fee-farm rent, a right of entry and forfeiture is granted, which turns the estate into one upon condition. * Or the right of entry is only granted for the purpose of giving the possession of the premises to the grantee of the rent, to reimburse himself for the accrued rent out of the profits of the land. Whether the entry results in a total or only a partial for-

* 2 Washb. on Real Prop. 278, 293; 3 Kent's Com. 472; Coburn v. Harney, 18 Wis. 147; Grant v. Whitwell, 9 Iowa, 154.

² 2 Washb. on Real Prop. 278, 279; Guild v. Rogers, 8 Barb. 502; 3 Kent's Com. 473 n; 2 Dane's Abr. 451.

³ 2 Washb. on Real Prop. 479; Swasey v. Little, 7 Pick. 296; Van Rensselaer v. Bonesteel, 24 Barb. 365; Van Rensselaer v. Slingerland, 26 N. Y. 587; Van Rensselaer v. Read, 26 N. Y. 564; Van Rensselaer v. Dennison, 35 N. Y. 400.

⁴ 2 Washb. on Real Prop. 281; Parker v. Webb, 3 Salk. 5; Duppa v. Mayo, 1 Saund. 281; Vyvyan v. Arthur, 1 B. & C. 410; Goodwin v. Gilbert, 9 Mass. 510; Adams v. Bucklin, 7 Pick. 121; Newell v. Hill, 2 Metc. 180; Burbank v. Pillsbury, 48 N. H. 476; Johnson v. Muzzy, 45 Vt. 419; Hinsdale v. Humphrey, 15 Conn. 433; Gale v. Nixon, 6 Cow. 445; Trustees v. Spencer, 7 Ohio, 149.

feiture of the estate, the grantee can enforce his right to the possession by the ordinary common-law action, by *writ of assize*, or by *ejectment*.¹ The remedies vary greatly according to the terms of each grant, and the local statute law of each State. For a more detailed statement of the appropriate remedies, the reader is referred to these statutes.

¹ 2 Washb. on Real Prop. 279, 280; Co. Lit. 201, note 85, 202; Farley v. Craig, 11 N. J. L. 262. See Stephenson v. Haines, 16 Ohio St. 478; Marshall v. Conrad, 5 Call, 364.

CHAPTER XVII.

LICENSES.

SECTION 651. What is a license?

652. Revocation of the license.

653. Revocation of license — Continued.

654. How licenses are created.

§ 651. What is a license? — A license is an authority or power to make use of land in some specific way, or to do certain acts or a series of acts upon the land of another. It differs from an easement in that it is not created by deed or by prescription, and hence is not a right or interest issuing out of land, no *jus in re*; simply a naked authority.¹ A license is a personal interest or right, which is terminated by the death of either the licensor or licensee, and which cannot be assigned without the consent of the licensor.² The licensee must exercise his authority in a reasonably prudent manner, and he will be held liable for all damages resulting from his negligence or unskilfulness; but he will not be responsible for any damage, which is but the natural consequence of the exercise of his authority.³

¹ Taylor v. Waters, 7 Taunt. 374; Cook v. Stearns, 11 Mass. 533; Blaisdell v. Railroad, 51 N. H. 485; Wolfe v. Frost, 4 Sandf. Ch. 72; Mumford v. Whitney, 15 Wend. 580; Bridges v. Purcell, 1 Dev. & B. 486.

² Wickham v. Hawker, F. M. & W. 77; Coleman v. Foster, 37 Eng. Law & Eq. 489; Emerson v. Fisk, 6 Me. 200; Ruggles v. Lesure, 24 Pick. 187; Cowles v. Kidder, 24 N. H. 364; Howe v. Batchelder, 49 N. H. 204; Blaisdell v. Railroad, 51 N. H. 485; Prince v. Case, 10 Conn. 375; Jackson v. Babcock, 4 Johns. 418; Wolfe v. Frost, 4 Sandf. Ch. 93; Snowden v. Wilas, 19 Ind. 13.

³ Selden v. Del. & Hud. Canal Co., 29 N. Y. 640; Pratt v. Ogden, 34 N. Y. 20; Kent v. Kent, 18 Pick. 569; Prince v. Case, 10 Conn. 375; Sampson v. Burnside, 13 N. H. 265; Fentiman v. Smith, 4 East, 107; Webb v. Pater-noster, Palmer, 71.

§ 652. **Revocation of the license.**—Since the license does not create any interest or estate in the land, as a general proposition it would seem that the continued enjoyment of the license should depend upon the will of the licensor. But the antagonism of interest and consequent loss, arising from the grant and subsequent revocation of a license, have produced no little confusion in the decisions of the courts. As long as the license remains executory there can certainly be no fixed indefeasible right to its enjoyment. The licensee has no remedy by which he may enjoin the licensor from prohibiting the exercise of his license.¹ The power to revoke is undoubted. So also is this the case with an executed license, where the revocation will leave the parties in the same condition as they were before the license was granted. Such would be the case of a license to fish or hunt upon another's land, for the purpose of witnessing some performance, as where one purchases a ticket for the theatre. All such licenses may be revoked at the will of the licensor. And in the case of a theatrical performance or other show, the licensee or ticket holder may be bidden to leave, and ejected by force if he refuses to do so, even though there is no valid cause for his removal.² But the revocation of the license will not be permitted to have a retroactive effect, so as to make the acts done by the licensee upon the land before revocation a trespass, or to make him liable for dam-

¹ *Cook v. Stearns*, 11 Mass. 533; *Sterling v. Warden*, 57 N. H. 217; 12 Am. Rep. 80; *Dodge v. McClintock*, 47 N. H. 483; *Miller v. Auburn, etc.*, R. R., 6 Hill, 61; *Veghte v. Raritan Co.*, 19 N. J. Eq. 154.

² *Wood v. Leadbitter*, 13 M. & W. 838; *Coleman v. Foster*, 37 Eng. L. & Eq. 489; *Morse v. Copeland*, 2 Gray, 302; *Sampson v. Burnside*, 13 N. H. 264; *Hill v. Hill*, 113 Mass. 103; 18 Am. Rep. 455; *McCrea v. Marsh*, 12 Gray, 213; *Burton v. Scherff*, 1 Allen, 134; *Desloge v. Pearce*, 38 Mo. 599. See *Ford v. Whitlock*, 27 Vt. 268; *Hays v. Richardson*, 1 Gill & J. 383; *Fahr v. Dean*, 26 Mo. 119. Likewise, a license to cut trees is revocable. *Hill v. Hill*, 113 Mass. 103; 18 Am. Rep. 455; *Giles v. Simonds*, 15 Gray, 444; *Tillotson v. Preston*, 7 Johns. 285; *Westcott v. Delano*, 20 Wis. 516; *Roffey v. Henderson*, 17 Q. B. 586.

ages flowing naturally from the exercise of his authority.¹ And if there is a valid subsisting contract for the grant and exercise of the license the revocation of the license will constitute a breach of the contract, for which the licensor will be liable in an action for damages. And so also, if in the exercise of the authority the licensee has taken property of his own upon the land (as, for example, where he erects a building), or acquires a title to personal property formerly the property of the licensor (as where the license is to go upon the land and cut trees for his, the licensee's, own use), a reasonable time must be given to the licensee within which to remove his property. To that extent under such circumstances is the license irrevocable. The revocation does not vest in the licensor the property of the licensee found upon the land.²

§ 653. **Revocation of license — Continued.** — Where the licensee in the exercise of his license has been put to considerable expense, and a revocation of the license results in great damage to the licensee, because of the impossibility to place the parties *in statu quo*, whether the license can be revoked has been differently decided. A large number of the courts have held that such a license is, nevertheless, revocable, and the revocation will not render the licensor liable to any action for damages.³ While, on the other

¹ *Hewlins v. Shippam*, 5 B. & C. 221; *Cook v. Stearns*, 11 Mass. 533; *Stevens v. Stevens*, 11 Metc. 251; *Kent v. Kent*, 18 Pick. 569; *Foot v. New Haven, etc., Co.*, 23 Conn. 223; *Prince v. Case*, 10 Conn. 378; *Selden v. Del. & Hud. Canal Co.*, 29 N. Y. 639; *Pratt v. Ogden*, 34 N. Y. 20; *Barnes v. Barnes*, 6 Vt. 388; *Bridges v. Purcell*, 1 Dev. & B. 496.

² *Wood v. Leadbitter*, 13 M. & W. 856; *Ashmun v. Williams*, 8 Pick. 402; *Churchill v. Hulbert*, 110 Mass. 42; 14 Am. Rep. 578; *Burk v. Hollis*, 98 Mass. 56; *Nettleton v. Sikes*, 8 Metc. 34; *Barnes v. Barnes*, 6 Vt. 388; *White v. Elwell*, 48 Me. 360; *Town v. Hazen*, 51 N. H. 596; *Parsons v. Camp*, 11 Conn. 525; *Smith v. Goulding*, 6 Cush. 155; *Desloge v. Pearce*, 38 Mo. 599.

³ *Cocker v. Cowper*, 1 Crompt. M. & R. 418; *Fentiman v. Smith*, 4 East, 107; *Owen v. Field*, 12 Allen 457; *Cook v. Stearns*, 11 Mass. 533; *Stevens v.*

hand, a number of the cases maintain, on the equitable grounds of estoppel and part performance of a contract, that the license is irrevocable in such cases.¹ If the authority is connected with, or is exercised in pursuance of, a contract for the grant of an easement, the licensee may prevent a revocation by an action for specific performance of the contract for an easement.² But a simple license, which is not in the nature of an executory contract for the future grant of an easement, not being an incorporeal hereditament or an estate in lands, is not an indefeasible fixed right, and can therefore be revoked. Perhaps a failure to observe this distinction has been the cause of the doubt and confusion to be met with in the cases.³ Perhaps the better rule is that

Stevens, 11 Metc. 251; Batchelder v. Wakefield, 8 Cush. 252; Foster v. Browning, 4 R. I. 47; Harris v. Gillingham, 6 N. H. 9; Houston v. Laffee, 46 N. H. 507; Sampson v. Burnside, 13 N. H. 264; Foot v. New Haven, etc., Co., 23 Conn. 223; Selden v. Del. & Hud. Canal Co., 29 N. Y. 639; Thompson v. Gregory, 4 Johns. 81; Mumford v. Whitney, 15 Wend. 380; Ex parte Coburn, 1 Cow. 568; Dexter v. Hazen, 10 Johns. 246; Hetfield v. Centre R. R., 29 N. J. L. 571; Hall v. Chaffers, 13 Vt. 150; Trammell v. Trammell, 11 Rich. 474; Addison v. Hack, 2 Gill, 221; Bridges v. Purcell, 1 Dev. & B. 492; Woodward v. Seeley, 11 Ill. 157; Clute v. Carr, 20 Wis. 533; Hazleton v. Putnam, 3 Chand. (Wis.) 117.

¹ Rerick v. Kern, 14 Serg. & R. 267; Lacey v. Arnett, 33 Pa. St. 169; Huff v. McCauley, 53 Pa. St. 209; Cook v. Prigden, 45 Ga. 331; Wickersham v. Orr, 9 Iowa, 260; Beatty v. Gregory, 17 Iowa, 114; Snowden v. Wilas, 19 Ind. 14. In others of the States, a middle ground is taken, that the licensor cannot revoke the license until he has reimbursed the licensee for his expenditures. See Woodbury v. Parshley, 7 N. H. 237; Addison v. Hack, 2 Gill, 221; Rhodes v. Otis, 33 Ala. 600, and cases cited *supra* from Iowa and Indiana.

² Veghte v. Raritan Co., 19 N. J. Eq. 153; Williamston, etc., R. R., v. Battle, 66 N. C. 546.

³ A further distinction, drawn from the law of Easements, would serve to suggest the most rational doctrine. If the license only involves the abandonment of the licensor's easement upon the licensee's land, and imposes no direct burden upon the licensor's land, the license is irrevocable, for an easement may be abandoned by parol. But if the license involves the permanent use of the licensor's land, and structures are to be maintained upon it, since that is nothing more than the grant of an easement, it may be revoked, if not granted by deed. This appears to be the position of the Illinois courts. See Russell v. Hubbard, 59 Ill. 337; Woodward v. Seeley, 11 Ill. 157; 1 Washb. on Real Prop. 636, 639. See also Winter v. Brockwell, 8 East,

where the licensor revokes his license in violation of a valid subsisting contract for its continuance, and thereby produces damage to the licensee, such damages should be, and are, recoverable in an action for the breach of the contract.¹ But, as a corollary to the above proposition, it may be stated that where the length of the enjoyment of the license is indefinite, as where the license is to erect and maintain a house, that being a bargain for a permanent interest in land in the nature of an easement, it can be granted only in the way in which such interests are required to be created, viz.: by deed, and therefore no action for damages will lie for its revocation. But a license upon sufficient consideration to cut and take away a certain number of trees, or to dig for minerals for a specific time, and the like, are valid, subsisting contracts, and the revocation of the license would be a breach of it, for which the licensor may be held liable.

§ 654. **How licenses are created.** — Licenses may be created either by express agreement, by parol,² or they may be implied from the inducements and representation of the land owner. Thus, merchants, professional men and artisans, impliedly give the public a license to enter their places of business for the purpose of transacting business. Such would also be the case between persons sustaining social relations, in respect to the right to enter each other's premises for the purpose of visiting.³

308; *Hewlins v. Shippam*, 5 B. & C. 221; *Morse v. Copeland*, 2 Gray, 202; *Dyer v. Sandford*, 9 Metc. 395; *Foot v. New Haven, etc., Co.*, 20 Conn. 223; *Veghte v. Raritan Co.*, 19 N. J. Eq. 153; *Addison v. Hack*, 2 Gill, 211; *Jamieson v. Milleman*, 3 Duer, 255; *Hazleton v. Putnam*, 4 Chand. (Wis.) 124.

¹ *Whitmarsh v. Walker*, 1 Metc. 316; *Giles v. Simonds*, 15 Gray, 444.

² *Wood v. Leadbitter*, 13 M. & W. 838; *King v. Horndon*, 4 M. & Sel. 562; *Muskett v. Hill*, 5 Bing. N. C. 694; *Doolittle v. Eddy*, 7 Barb. 74; *Ex parte Coburn*, 1 Cow. 568; *Blaisdell v. R. R.*, 51 N. H. 485.

³ *Martin v. Houghton*, 45 Barb. 60; *Adams v. Truman*, 12 Johns. 408; *Gowan v. Phila. Exchange Co.*, 5 Watts & S. 141; *Kay v. Penn. R. R.*, 65 Pa. St. 273; *Sterling v. Warden*, 51 N. H. 231; 12 Am. Rep. 80.



PART III.

TITLES.

CHAPTER XVIII. GENERAL CLASSIFICATION OF TITLES.

XIX. TITLE BY DESCENT.

XX. TITLE BY ORIGINAL ACQUISITION.

XXI. TITLE BY GRANT.

XXII. DEEDS, THEIR REQUISITES AND
COMPONENT PARTS.

XXIII. TITLE BY DEVISE.

CHAPTER XVIII.

TITLES — GENERAL CLASSIFICATION OF TITLES.

SECTION 659. What is title? — By descent and purchase.

660. Original and derivative titles.

§ 659. **What is title? — By descent and purchase.** — A title is the means by which one may acquire a right of ownership in things; *Justa causa possidendi quod nostrum est*.¹ When applied to real property, titles may be divided into two general classes, title by descent and title by purchase. Title by descent is that title which one acquires by law as heir to the deceased owner. It is cast upon the heir with or without his consent. His assent is not necessary, and he cannot by any disclaimer divest himself of the title so acquired.² Every other kind of title, whether vested by act of the parties or by operation of the law, is called a title by purchase. The party, in whose favor it is created, must accept it in order that any title may pass, either expressly or by acts which clearly indicate his assent. But he cannot be compelled to accept unless he has placed himself under obligations by a valid contract of sale.³

§ 660. **Original and derivative titles.** — Titles by purchase may be again subdivided into *original* and *derivative*.

¹ Co. Lit. 345 b; 3 Washb. on Real Prop. 1, 2; Bart. on Real Prop., sect. 314.

² Co. Lit. 191 a, note 77, sect. V., 1; Bac. Law Tracts, 128; 2 Bla. Com. 201; Williams on Real Prop. 97; *Womack v. Womack*, 2 La. An. 339. But he may formally renounce in Louisiana. *Reed v. Crocker*, 12 La. An. 436.

³ 3 Cruise Dig. 317; Co. Lit. 18 b, note 106; 4 Kent's Com. 373; Williams on Real Prop. 96, 97; *Nicolson v. Wardsworth*, 2 Swanst. 365, 372.

An original title is one which is acquired solely by act of the party claiming it, and is obtained by his entry into possession. It is a general rule of both natural and civil law, that things under dominion of no person may become the property of any one by mere entry into possession, and it includes not only those things which have never been under the dominion of any one, but also those, the dominion over which has been lost or abandoned. Derivative title is that by which property is acquired from another, in whom the right of property has been vested. It involves the idea of a transfer or assignment of the right of property from one to another. This transfer may be effected by act of the former owner, as by conveyance *inter vivos*, or testamentary disposition, or it may be by operation of law.¹

¹ This subdivision is very generally used by the continental jurists instead of the division of titles into *descent* and *purchase*. See Holtzendorff's *Encyclopædie der Rechtswissenschaft*, pp. 386-390. It is here introduced in the belief that the distinction might serve to explain a few difficult questions which arise in respect to several kinds of titles, more notably titles by limitation and estoppel, as they are called by the different authors. It will be observed that in the present work they are not considered as modes of acquiring titles — only modes of perfecting titles already acquired by destroying or nullifying other outstanding rights or titles in other persons. See *post*, sects. 717, 729, 730.

CHAPTER XIX.

TITLE BY DESCENT.

SECTION 663. Definition.

- 664. *Lex loci rei sitæ*.
- 665. Consanguinity and affinity.
- 666. How lineal heirs take.
- 667. Lineal consanguinity in the ascending series.
- 668. Collateral heirs.
- 669. Computation of collateral relationship.
- 670. Ancestral property.
- 671. Kindred of the whole and half blood.
- 672. Advancement—Hotchpot.
- 673. Posthumous children.
- 674. Illegitimate children.
- 675. Alienage a bar to inheritance.

§ 663. **Definition.**—Title by descent is that title, by which one acquires by operation of law upon the death of the owner the estates of inheritance, which the deceased has not disposed of in any other manner. The person from whom the property descends is called the ancestor.¹ The person who is appointed by the law to take the estates is called the heir. Technically, one who takes property under a will is not an heir. And the word heir is also confined to those persons who take the real estate. One cannot be an heir to personal property.² The heirs cannot be ascertained until

¹ In that sense a child might be the ancestor of his parents, a grandchild the ancestor of his grandparents. 3 Washb. 18; Prickett v. Parker, 3 Ohio St. 390; Williams on Real Prop. 105. This was opposed to the common law, according to which "the inheritance lineally descends, but never lineally ascends." See *post*, 667.

² Bac. Law Tracts, 128; Co. Lit. 191 a, note 77; Donahue's Estate, 36 Cal. 329.

the death of the ancestor. *Nemo est hæres viventis*.¹ The heir never takes in pursuance of the deceased owner's intention or will; consequently no one, who by law is entitled to the property as heir, can be shut out from his inheritance by any act of the ancestor, unless such act amounts to a disposition of the property by will.² And even where a will, disposing of all the ancestor's property, is produced, if it be shown that the omission of the name of an heir, especially if it be a child or a grandchild, is the result of an accident, and that the testator fully intended that he also should take under the will, such heir will be permitted to take the share of the estate to which he would have been entitled if the ancestor had died intestate. And in the absence of direct proof of the testator's intention, the failure to mention the particular heir will raise the presumption that the omission was accidental.³ Immediately upon the death of the ancestor the title to all his estates of inheritance vests in the heir or heirs, subject to the widow's dower and husband's tenancy by the curtesy, and the claims of the ancestor's creditors.⁴ He is entitled to the rents and

¹ 2 Bla. Com. 208; 3 Washb. on Real Prop. 6; Williams on Real Prop. 96. But in common parlance persons are recognized as possible heirs to a certain individual if they should survive him. And in view of the existence of this possibility, the common law made use of the two expressions, heirs presumptive, and heirs apparent. An heir presumptive is one who would be the heir if the ancestor were to die at the contemplated time, but whose possibility of inheritance may be destroyed by the birth of some one more nearly related, as well as by his death before the ancestor. An heir apparent was one who was sure to inherit, if the ancestor died in his life time. These terms are of no practical importance, as no rights of property are acquired by such parties which the law in any way recognizes. See *Lockwood v. Jessup*, 9 Conn. 228.

² *Augustus v. Seabolt*, 3 Metc. (Ky.) 161; *Doc v. Lavins*, 3 Ind. 441; *McIntire v. Cross*, *Id.* 444; *Denson v. Anthey*, 21 Ala. 205; *Wright v. Hicks*, 12 Ga. 155; *Haxtum v. Corse*, 2 Barb. Ch. 506; *Roosevelt v. Fulton*, 7 Cow. 71.

³ *Beck v. Metz*, 25 Mo. 70; *Gage v. Gage*, 29 N. H. 533; *Bancroft v. Ives*, 3 Gray, 397; *Shelby v. Shelby*, 6 Dana, 60; *Bradley v. Bradley*, 24 Mo. 311.

⁴ *Willis v. Watson*, 5 Ill. 64; *Hays v. Jackson*, 6 Mass. 149; *Wilson v. Wilson*, 13 Barb. 252; *Shanks v. Lucas*, 4 Blackf. 476; *Chubb v. Johnson*, 11

profits of the estate until sold for the benefit of the creditors, even though the estate is insolvent.¹ The heir need not offer proof that his ancestor died intestate. Intestacy is presumed until a will is produced.²

§ 664. *Lex loci rei sitæ*. — The descent of real property is governed by the law of the place where the land is situated, the *lex loci rei sitæ*. The law of the domicile, *lex domicilii*, does not apply to real property. And that law of descent governs, which was in force at the decease of the ancestor.³ The law of descent varies according to the civil polity of each State, or, as Blackstone has it, it is “the creature of civil polity and *juris positivi*.” In every State of the American Union there is a statute regulating the descent of real property, and for any special question arising under the law of descent reference must be had to the statute of the State in which the land lies. But these statutes have many points in common, and are controlled by certain general principles which may be collated and presented in a work of this character. But for the minor details of the law, the inquirer must look to the State statutes, an excellent compendium of which may be found in the third volume of Mr. Washburn’s *Treatise on the Law of Real Property*, pp. 21, *et seq.*

Texas, 469; *Vansycle v. Richardson*, 13 Ill. 171; *Baxter v. Bradbury*, 20 Me. 260; *Coppinger v. Rice*, 33 Cal. 408; *Cowell v. Weston*, 20 Johns. 414; *Farrell v. Enright*, 12 Cal. 450; *Marvin v. Schilling*, 12 Mich. 356; *Watkins v. Hopkins*, 16 Pet. 25; *Hillhouse v. Chester*, 3 Day, 166. See *contra*, *Telfair v. Roe*, 2 Cranch, 407; *Albriton v. Bird*, R. M. Charl’t. 93.

¹ *Gibson v. Farley*, 16 Mass. 280; *Boynton v. Peterborough, etc., R. R. Co.*, 4 Cush. 467; *Lobdell v. Hayes*, 12 Gray, 238; *Newcomb v. Stebbins*, 9 Metc. 540; *Green v. Massie*, 13 Ill. 363; *Allen v. Van Houton*, 19 N. J. L. 47. *Contra*, *Branch Bk. v. Fry*, 22 Ala. 790.

² *Lyon v. Kain*, 36 Ill. 368; *Baxter v. Bradbury*, 20 Me. 260; *Stephenson v. Doe*, 8 Blackf. 508.

³ Story on Conf., sect. 484; *Potter v. Titcomb*, 22 Me. 300; *Smith v. Kelly*, 23 Miss. 167; *Miller v. Miller*, 10 Metc. 393; *Marshall v. King*, 24 Miss. 85; *McGaughey v. Henry*, 15 B. Mon. 383; *Jones v. Marable*, 6 Humph. 116; *Price v. Tally*, 10 Ala. 946; *Eslava v. Farmer*, 7 Ala. 543.

§ 665. **Consanguinity and affinity.** — Only those persons can claim as heirs of a deceased intestate who are in some way related to him. Relationship is of two kinds, *consanguinity* and *affinity*. Consanguinity is that relationship which arises from a community of blood, and exists between persons who are descended from a common ancestor. This common ancestor is called the *stirps*, or root. Consanguinity is again divided into *lineal* and *collateral*. Lineal consanguinity exists between persons who descend one from the other in the direct or single line of descent. Father, grandfather, etc., in the ascending series, and son, grandson, etc., in the descending series, are related by lineal consanguinity. Collateral consanguinity is where the relationship is traced through different lines of descent up to the common ancestor. Thus, brothers, cousins, nephews and uncles, etc., are related by collateral consanguinity, respectively, through the common father and grandfather.¹ Affinity is the relationship created between parties by marriage, either of themselves, or of their respective relatives. Thus, husband and wife, and their respective fathers and mothers-in-law, and the like, are related by affinity. At common law only kindred by consanguinity could inherit from the deceased. And this rule was so strictly observed that even the husband or wife could not lay claim to the property of each other as heir. It would be escheated to the State instead of vesting in such relations.² But at the present day, in a large number of the American States, husband and wife are made capable by statute of inheriting from each other. In some States they inherit equally with the children and the descendants of deceased children, while in others they inherit only in the absence of lineal descend-

¹ 3 Washb. on Real Prop. 9, 10; 2 Bla. Com. 202, 206.

² 2 Bla. Com. 246. See *Esty v. Clark*, 101 Mass. 36; 3 Am. Rep. 320; *Lord v. Bourne*, 63 Me. 368; 18 Am. Rep. 234; *Cleaver v. Cleaver*, 39 Wis. 96; 20 Am. Rep. 30.

ants, and in some they are even postponed to collateral heirs.¹

§ 666. **How lineal heirs take.** — According to the common law, the real estate descended to the eldest son, to the exclusion of the other sons and daughters; and if there be no sons, then the daughters inherited in equal shares. This was known as the law of *primogeniture*.² And even where according to local custom, as was the case with lands held by tenure of gavelkind, the law of primogeniture did not prevail, the sons would inherit equally to the exclusion of the daughters and their descendants.³ But neither of these English rules has ever been in force in this country, and the universal rule is that the lineal descendants in the descending series inherit equally, no distinction being made between males and females.⁴ If the lineal descendants are all in the same degree removed from the intestate ancestor, they will inherit equally, and are said to take *per capita*. But if they are removed in different degrees, or where they consist of a son, or daughter, and the children of a deceased son or daughter, the children would inherit only that share of the deceased's estate to which their father or mother would have been entitled, if he or she had survived the deceased. Thus, in the given case, the estate would be divided into two equal parts, the surviving son or daughter taking the

¹ See *Shaw v. Breese*, 12 Ind. 392; *Nicholas v. Parcell*, 21 Iowa, 265; *Brown v. Belmarde*, 3 Kan. 41; *Hammon v. Steer*, 2 Gill & J. 14. Statutory rules of this character are to be found in Alabama, Arkansas, California, Dakota, Georgia, Illinois, Iowa, Massachusetts, Maryland, Michigan, Minnesota, Missouri, North Carolina, Nebraska, Pennsylvania, Rhode Island, South Carolina, Vermont, Wisconsin. 3 Washb. on Real Prop. 21, note.

² 3 Washb. on Real Prop. 7; 1 Spence Eq. Jur. 175, 176; 2 Bla. Com. 214, 215.

³ 3 Washb. on Real Prop. 7; 2 Bla. Com. 234; 2 Bla. Com. 84.

⁴ 3 Washb. on Real Prop. 8, 9, 12; Walker's Am. Law, 353; 4 Kent's Com. 378. In respect to the equality of inheritance by lineal heirs, the American law bears a close resemblance to the Roman law of descent. Coop. Just. 643.

one part, while the other part would be divided among the children of the deceased child. This is called inheritance *per stirpes*, or by representation. At common law all lineal descendants took *per stirpes*, but the rule in this country is generally limited to the case of descendants of unequal degrees of removal from the ancestor.¹

§ 667. **Lineal consanguinity in the ascending series.** — It was a canon of the common law that the inheritance could never fall to persons related to the deceased in the ascending series. Thus, parents, grandparents, etc., of the deceased could not inherit.² If, therefore, there were no lineal descendants, *i.e.*, issue, the property would have descended to the collateral kindred to the exclusion of the lineal relations in the ascending line.³ But this rule has now generally been changed by statute, and the lineal heirs in the ascending series will take in preference to collateral kindred.⁴

§ 668. **Collateral heirs.** — But if there be no lineal descendants, and no lineal heirs in the ascending line, or no

¹ Chase Bla. Com. 389, n. 6; Walker's Am. Law, 354; 4 Kent's Com. 379, 391, 408; 3 Washb. on Real Prop. 12, 13. See Skinner v. Fulton, 39 Ill. 484; Quincy v. Higgins, 14 Me. 309; Stewart v. Collier, 3 Har. & J. 289; Parker v. Nims, 2 N. H. 460; Den v. Smith, 2 N. J. L. 7.

² 3 Washb. on Real Prop. 10; 2 Bla. Com. 208, 209.

³ 3 Washb. on Real Prop. 11; 2 Bla. Com. 209; Taylor v. Bray, 32 N. J. L. 182.

⁴ Williams on Real Prop. 105, 106; Morris v. Ward, 36 N. Y. 587; 2 Bla. Com. 220; Kelsey v. Hardy, 20 N. H. 479; 4 Kent's Com. 395 n; Delaney v. Walker, 9 Port. 497; Fowler v. Trewhitt, 10 Ala. 632; Hays v. Thomas, 1 Ill. 136; Noland v. Johnson, 5 J. J. Marsh. 351. The rule is established by statute in Alabama, Arkansas, California, Connecticut, Dakota, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Tennessee, Vermont, Virginia, Wisconsin. 3 Washb. on Real Prop. 21, note.

statute permitting such heirs to inherit, the estate descends to the collateral kindred in the nearest degree of relationship to the deceased.¹ And at common law the doctrine of inheritance *per stirpes*, or by representation, as above explained, was applied to collateral kindred *ad infinitum*; but the doctrine in the United States has generally been limited in its application to the descendants of brothers and sisters, while in the case of all other collateral kindred the inheritance is divided *per capita*.²

§ 669. **Computation of collateral relationship.** — There are two modes of computing the degree of collateral relationship; one according to the canon and common law, and the other according to the civil or Roman law. By the first rule the relationship is ascertained by counting the number of degrees or generations accruing between the common ancestor and the most remote descendant. According to this mode of computation, first cousins are related in the second degree; so also are nephews and uncles. The civil rule is to count the number of degrees or generations between the deceased and the common ancestor, and down again to the descendant, whose relationship with the deceased is in question. Thus, by this mode, brothers would be related in the second degree, cousins in the fourth, and nephew and uncle in the third.³ In the American States the civil mode of computation is generally adopted by the

¹ 2 Bla. Com. 220; 3 Washb. on Real Prop. 11; Williams on Real Prop. 106.

² *Quinby v. Higgins*, 14 Me. 309; *Levering v. Heighee*, 2 Md. Ch. 81; *Ellicott v. Ellicott*, *Id.* 468; *Jackson v. Thurman*, 6 Johns. 322; *Parker v. Nims*, 2 N. H. 460; *Skinner v. Fulton*, 39 Ill. 484. This limitation is established by statute in Alabama, California, Connecticut, Delaware, Georgia, Maine, Massachusetts, Mississippi, Michigan, Minnesota, Maryland, Wisconsin, New Hampshire, New Jersey, Oregon, South Carolina, Tennessee, Vermont. In Pennsylvania the rule is more extended, but not unlimited. 3 Washb. on Real Prop. 21, note.

³ 3 Washb. on Real Prop. 10; 2 Bla. Com. 206, 207.

courts, while in some of the States it is by statute made the rule of computation.¹

§ 670. **Ancestral property.** — This term, when used in the law of descent, signifies the property which the intestate himself acquires by descent.² Where the property is acquired by purchase by the intestate, since the common-law preference of males over females does not prevail here, all the collateral kindred of equal degree would inherit alike, whether they are paternal or maternal relatives. But according to the common law, no one could be heir to ancestral property, unless he is likewise the heir of the last purchaser.³ But in the United States it would seem that no such distinction is made between property acquired by purchase and by descent, unless expressly established by statute. In Indiana, Maryland, Ohio, Pennsylvania, Rhode Island and New York, statutes provide that ancestral property descends to kindred of the blood of the ancestral purchaser in preference to other kindred, but the latter inherit, if there be no heirs of the ancestral purchaser's blood.⁴

§ 671. **Kindred of the whole and half blood.** — At common law the inheritance could only vest in kindred of the whole blood, *i.e.*, persons descended not merely from a common ancestor, but from a common couple of ancestors. Kindred of the half blood could not inherit, even where there

¹ 3 Washb. on Real Prop. 10; McDowell v. Adams, 45 Pa. St. 430; Walker's Am. Law, 358; Doe v. Gilbert, 2 Miss. 32. Regulated by statute in Maine, Massachusetts, Minnesota, Michigan, Mississippi, Oregon, Wisconsin. 3 Washb. on Real Prop. 21, note.

² Walker's Am. Law, 354.

³ 2 Bla. Com. 220; 3 Washb. on Real Prop. 11; Williams on Real Prop. 100, 101.

⁴ 3 Washb. on Real Prop. 21, note; Case v. Wildridge, 4 Ind. 51; Ramsey v. Ramsey, 7 Ind. 607; Kelsey v. Hardy, 20 N. H. 479; Fowler v. Trew hitt, 10 Ala. 622. See Kelly v. McGuire, 15 Ark. 555; Duncan v. Lafferty, 6 J. J. Marsh. 46; Childress v. Cutter, 16 Mo. 24; Hyatt v. Pugsley, 33 Barb. 373.

were no kindred of the whole blood.¹ Probably in no State of the American Union are kindred of the half blood absolutely excluded from inheriting.² In some States no distinction is made between whole and half blood, while in others the half blood are postponed in the inheritance to the whole blood of equal degree of relationship.³ In a still larger number of the States it is provided by statute that kindred of the half blood shall not inherit the ancestral property of the intestate, unless they are of the blood of the ancestral purchaser.⁴

§ 672. **Advancement — Hotchpot.** — In effecting a distribution of the estate among the heirs, if any one of the heirs received a part of the ancestor's estate during his lifetime, it is required that the same be considered as a part of

* 2 Bla. Com. 227. The only exception was where the deceased was not actually seised, and the person last seised was the common ancestor of the kindred of half blood, such kindred could inherit, not as heir to the deceased, but as heir to the common ancestor, in conformity with the common-law rule that only the heirs of the person last seised could inherit. 2 Bla. Com. 227.

* 3 Washb. on Real Prop. 15; Chase's Bla. 393, n. 8.

* 3 They inherit equally in Maryland, Indiana, North Carolina and Tennessee. *Lowe v. Maccubben*, 1 Harr. & J. 550; *Osborne v. Widenhouse*, 3 Jones Eq. 238; *Doe v. Turner*, 2 Hawks, 435; *Doe v. Sheppard*, 3 Murph. 333; *Nichol v. Dupree*, 7 Yerg. 415; *Arnold v. Den*, 2 South. 862; *Moore v. Abernathy*, 7 Blackf. 442. Half blood postponed to whole blood by statute in England, Connecticut, Delaware, Pennsylvania, South Carolina, New Jersey, Mississippi and Texas. *Clark v. Pickering*, 16 N. H. 289; *Hulme v. Montgomery*, 31 Miss. 105; *Clay v. Cousins*, 1 B. Mon. 75; *Fatheree v. Fatheree*, 1 Miss. 311; *Hitchcock v. Smith*, 3 Stew. & P. 29; Chase Bla. 393, n. 8; 3 Washb. on Real Prop. 21, note. In Missouri and Kentucky the half blood take only one-half of what descends to the whole blood. *Talbot v. Talbot*, 17 B. Mon. 1; *Petty v. Malier*, 15 B. Mon. 591.

* 4 The rule prevails in Alabama, Arkansas, California, Connecticut, Delaware, Georgia, Illinois, Indiana, Maine, Massachusetts, Maryland, Michigan, Minnesota, New Jersey, New York, Ohio, Oregon, Tennessee, Wisconsin. 3 Washb. on Real Prop. 21, note; 4 Kent's Com. 406; *Danner v. Shissler*, 31 Pa. St. 289; *Sheffield v. Lovering*, 12 Mass. 490; *Armington v. Armington*, 28 Ind. 74; *Pennington v. Ogden*, 1 N. J. L. 192. In New Jersey they inherit of each other only the property derived from a common ancestor. *Den v. Urison*, 2 N. J. L. 212; *Den v. Jones*, 8 N. J. L. 340.

the estate of the deceased, and be deducted from the share such heir was entitled to under the law of descent. In determining the share of each, the property so advanced is added to the rest of the estate, and the division is then made, by dividing the aggregate amount equally among the heirs, the amount advanced being treated as a part of the share of the heir, to whom it was given. In the curious etymology of the common law this doctrine was called "hotchpot."¹ The doctrine is now more commonly understood under the term *advancement*. In order, however, that the doctrine may apply, it must be established by competent evidence, and in some of the States certain modes of proof are prescribed and rendered necessary by statute, that the gift *inter vivos* was intended to be treated as an advancement. A simple gift, without proof of such an intention, will be considered an 'absolute gift, and cannot affect the donee's right to an equal share in the deceased's estate. But in no case can the donee be compelled to bring in his advancement for a re-distribution. If, therefore, his advancement is of greater value than his share in the estate would be, he may refuse to bring it in, and thereby renounce his claim as an heir.²

¹ "It seemeth that this word hotch-pot is in English a pudding; for in a pudding is not commonly put one thing alone, but one thing with other things together." Littleton, quoted by Blackstone. 2 Bla. Com. 190. But in the early common law the doctrine was made to apply to only those estates which were given to a daughter in frank-marriage — a species of estates tail, settled upon a woman at her marriage. Property so donated raised the conclusive presumption that it was intended as an advancement. 2 Bla. Com. 191. The doctrine is now applied to all kinds of advancements where it has not been abolished by statute.

² 3 Washb. on Real Prop. 20; 4 Kent's Com. 418, 419; *Clark v. Fox*, 9 Dana, 193. The doctrine is expressly recognized and regulated by statute in Maine, Massachusetts, Vermont, California, Oregon, Wisconsin, Michigan, Minnesota, New Hampshire, New York, Alabama, Arkansas, Dakota, Ohio, Rhode Island, Connecticut, New Jersey, Pennsylvania, Virginia, North Carolina, Georgia, Mississippi, Texas, Florida, Illinois, Kansas, Kentucky, Missouri, Indiana, Tennessee and Maryland. 3 Washb. on Real Prop. 40, note.

§ 673. **Posthumous children.** — The common law did not treat children *en ventre sa mere* as persons *in esse* for the purpose of holding or acquiring property. This capacity only attached upon their birth alive. Consequently, by the old common law, children born after the death of the ancestor were precluded from participating with the others in the distribution of the intestate's estate. But this harsh rule has now been generally changed by statute, and posthumous children in the United States inherit equally with those born during the life of the ancestor.¹

§ 674. **Illegitimate children.** — It is also a common-law rule that illegitimate children have no inheritable blood, and can neither inherit nor have heirs, except lineal descendants in the descending series. Bastards, therefore, could have neither collateral nor lineal heirs in the ascending line.² But by statute, in a large number of the American States, an illegitimate child is now permitted to inherit from the mother and its maternal ancestors, and the mother, and in some States, its brothers and sisters, from the child. But it would seem likely that the illegitimate child could only inherit from the mother, where there are no legitimate children.³ But a number of the States have adopted the rule

¹ 4 Kent's Com. 412; *Harper v. Archer*, 4 Smed. & M. 99; *Den v. Flora*, 8 Ired. 374; *Morrow v. Scott*, 7 Ga. 535; *Bishop v. Hampton*, 11 Ala. 254; *Buchanan's Estate*, 8 Cal. 507; *Cox v. Matthews*, 17 Ind. 367; *Haskins v. Spiller*, 1 Dana, 170; *Harper v. Archer*, 12 Miss. 99. Statutes modifying the common-law rule exist in most of the States of the Union. 3 Washb. on Real Prop. 44, note. In Alabama, Arkansas, Missouri, and Texas the doctrine applies only to the posthumous children of the intestate. Ala. Code (1867), sect. 1893; Ark. Dig. Stat. (1858), ch. 56, sect. 2; Mo. Gen. Stat. (1866), p. 518, ch. 129, sect. 2.

² 2 Bla. Com. 247, 248, 249; 2 Kent's Com. 212; *Cooley v. Dewey*, 4 Pick. 93; *Barwick v. Miller*, 4 Desau. 434; *Stover v. Boswell*, 3 Dana, 233; *Bent v. St. Vrain*, 30 Mo. 268.

³ See *Coe v. Bates*, 6 Blackf. 533; *Ellis v. Hatfield*, 20 Ind. 101; *Stover v. Boswell*, 3 Dana, 233. Statutes to this general effect are to be found in Massachusetts, Indiana, Mississippi, Texas, Vermont, Alabama, New Hampshire,

of the civil law, that the subsequent marriage of the parents of a child born out of wedlock legitimizes such offspring for all purposes, and enables it to inherit equally with the children born after the marriage. However, the statutes generally require the putative father to acknowledge such a child, in order that the subsequent marriage may produce legitimation.¹

§ 675. **Alienage, a bar to inheritance.** — Since an alien at common law was not permitted to hold lands, and such lands which he did acquire became escheated to the State after “office found,” it was held to be impossible for him to inherit from another, as the law would not cast upon him the title to lands which he could not hold.² Nor did he have sufficient inheritable blood to transmit the inheritance to collateral heirs, who were citizens. Thus, brothers could

Illinois, Rhode Island, Pennsylvania, Virginia, Kentucky, Florida, Arkansas, Iowa, Missouri, New York, Maryland, Kansas, Ohio and Georgia. Williams on Real Prop. 126, *n* 2; 3 Washb. on Real Prop. 41, note; Brown v. Dye, 2 Root, 280. In New Hampshire, by express statutory provision, illegitimate children inherit equally with legitimate children; while in New York they are expressly precluded from inheriting, if there be legitimate issue. Gen. Stat. N. H. (1867), ch. 184, sects. 4, 5; N. Y. Laws of 1855, ch. 547; 1 R. S. 754, sect. 19. Under the Mississippi statute they inherit equally. Alexander v. Alexander, 31 Ala. 241. But wherever the statute does not expressly, or by necessary implication, remove the common-law incapacity, the common law still prevails. A statute making an illegitimate child heir to its mother does not enable it to inherit from its brothers, or transmit its own estate by descent to its mother. Bent's Adm'r v. St. Vrain, 30 Mo. 268; Stephenson's Heirs v. Sullivan, 5 Wheat. 260; Little et al. v. Lake, 8 Ohio, 290; Remington v. Lewis, 8 B. Mon. 606.

¹ Such statutes have been enacted in Massachusetts, Vermont, Maryland, Virginia, Kentucky, Mississippi, Texas, Oregon, Iowa, Indiana, Arkansas, Ohio, Missouri, Illinois, New Hampshire, Nebraska. Jackson v. Moore, 8 Dana, 170; 3 Washb. on Real Prop. 41, note. In Nebraska and California the acknowledgment of the child by the father must be in writing. Rev. Stat. Neb. (1866), pp. 62; Pina v. Peck, 31 Cal. 359. And in Missouri the statute provided that the offspring of marriages, which have been declared null and void, shall be legitimate. Gen. Stat. Mo. (1865), p. 519, ch. 129, sect. 11.

² 1 Bla. Com. 372; 2 *Id.* 249.

not inherit from each other if their parents were aliens.¹ But now, by statute, in England and in this country generally, such persons may inherit from each other, although they claim relationship through some person who is an alien.² And where an alien is specially authorized by statute to hold and take lands by descent, it seems that only those relations can inherit from him, who are citizens. At least, if there are such heirs, and others who are aliens, the former will inherit to the exclusion of the latter.³ But in a number of the States statutes have been passed removing altogether the disability of alienage.⁴

¹ 2 Bla. Com. 250.

² 2 Bla. Com. 251; Chase Bla. Com. 395, n. 9. Such is the statutory rule in Virginia, Kentucky, Florida, Arkansas, Texas, New York, Missouri and Massachusetts. 3 Washb. on Real Prop. 44, note. See next note.

³ *Parish v. Ward*, 28 Barb. 328; *McGregor v. Comstock*, 3 N. Y. 408. In New York it is provided by statute that the alienage of an ancestor does not prevent a person from inheriting from another, of whom the alien is a common ancestor. 1 Rev. Stat. (N. Y.) 754, sect. 22. But it has been held by the New York courts that this statute does not enable one to take by descent through the alien, if the latter would have been heir but for the fact that he was not a citizen. *People v. Irvin*, 21 Wend. 128; *McLean v. Swanton*, 13 N. Y. 535. See *Jackson v. Jackson*, 6 Johns. 214; *Orser v. Hoag*, 3 Hill, 79.

⁴ Williams on Real Prop 65, n. 1; Chase Bla. Com. 119, n. 2.

CHAPTER XX.

TITLE BY ORIGINAL ACQUISITION.

- SECTION I. *Title by occupancy.*
II. *Title by accretion.*
III. *Title by adverse possession.*
IV. *Statute of Limitations.*
V. *Estoppel.*
VI. *Abandonment.*

SECTION I.

TITLE BY OCCUPANCY.

SECTION 681. Definition.

682. Condition of public lands in the United States.

683. Estates *per auter vie*.

§ 681. **Definition.** — Occupancy, in the technical signification of the term, is the act of taking possession of land which before was the common property of the people or community.¹ Under the theory that in the prehistoric age lands were originally common property, this must have been the original mode of acquiring therein a right of private property.

§ 682. **Condition of public lands in the United States.** — According to the common law of England and of this country, there is no common property in lands. Here lands which are not the property of private persons are held to be the property of the State or the United States, according to the circumstances. England claimed by the right of discovery the title to the soil, denying any claim thereto of

¹ 2 Bla. Com. 257.

the aborigines, on the ground that their nomadic life prevented them from acquiring more than a temporary right of occupation, something in the nature of revocable or defeasible licenses or tenancies at will.¹ This right was in turn granted by letters patent to the various colonies, which were established under the British government, and the unappropriated lands within their boundaries became the property of the respective colonial governments.² But all lands lying outside of the colonies remained the property of Great Britain, including both the lands acquired under the claim of discovery and those purchased from other civilized nations.³ And, upon the successful issue of the American revolution, these lands became the property of the United States. Subsequently a number of the States, which claimed title to extensive tracts of lands in the then unexplored West, under their charters from the crown, ceded them to the United States for the benefit of the Union. There have also been purchases by the United States from other nations, notably Louisiana, Florida, and the large tracts of territory ceded by Mexico, to the unappropriated lands of which the same theory of property in the government has been applied.⁴ There are, therefore, in this country no lands without an owner; and the so-called *public* lands being the property of the States or the United States, the legal title to them can only be acquired by grant from the government.⁵

¹ 3 Washb. on Real Prop. 164; 1 Story on Const. 3; *Johnson v. McIntosh*, 8 Wheat. 543; *Martin v. Waddell*, 16 Pet. 367.

² 1 Curtis on Const. 425; *Jackson v. Hart*, 12 Johns. 81; *Worcester v. Georgia*, 6 Pet. 544; *Commonwealth v. Roxbury*, 9 Gray, 478.

³ *Johnson v. McIntosh*, 8 Wheat. 543; *Worcester v. Georgia*, 6 Pet. 548.

⁴ 3 Washb. on Real Prop. 165, 166; 1 Story on Const. 215; 1 Kent's Com. 259; *Terrett v. Taylor*, 9 Cranch, 50.

⁵ Under the laws of Congress, however, the actual settler upon public lands acquires by such act of occupation an equitable title in the nature of a right to the legal title, upon payment of the minimum price fixed by law. This right is called pre-emption, and further reference will be made to it in treating of title by public grant or patent. See *post*, sect. 747.

§ 683. **Estates per auter vie.** — It will be remembered, in treating of these estates, it was stated that upon the death of the tenant *per auter vie*, during the life of the *cestui que vie*, the common law gave the estate to the first occupant in the case of an ordinary estate *per auter vie*, and he was called the *general occupant*. But where the estate was limited to the tenant and *his heirs* during the life of another, his heirs took the estate by so-called *special* occupancy to the exclusion of the *general* occupant.¹ But this common-law doctrine has now been abolished by statute in England, and in most, if not all, of the United States. The estate is either given the quality of an estate of inheritance, and descends to the heirs of the tenant *per auter vie*, or is made a chattel real, and vests in his personal representatives.²

¹ See *ante*, sect. 61; 2 Bla. Com. 258, 259, 260.

² 3 Washb. on Real Prop. 50, 51; Chase Bla. Com. 414, n. 1. See *ante*, sect. 61.

SECTION II.

TITLE BY ACCRETION.

SECTION 685. Definition.

686. Alluvion.

687. *Filum Aquæ*.

§ 685. **Definition.**—It is a rule in the law of real property that whenever other species of property become attached to the land already in one's possession, it becomes a part of the land and the property of its owner, and the title thereto is generally acquired by the very act of attachment. *Quidquid plantatur solo, solo cedit*. It has been shown that the rule applies to houses and other structures erected upon the land by strangers without the consent of the owner of the land.¹ But at present we are only concerned with the doctrine so far as it applies to the additions of foreign soil through the co-operation of natural causes, which are known under the term *alluvion*. The mode of acquiring a right of property in such cases is called *title by accretion*. It is more properly an incident to real property than a mode of acquisition of lands. But inasmuch as new property is thus acquired, the means or manner of acquisition may fitly be called a title.²

§ 686. **Alluvion.**—This is the soil and various other things, such as marine and water plants, sea-weeds, etc., which are washed up on the shore of a stream by the action of the water. It is a notable and common fact that the current of a stream is constantly changing by the washing

¹ See *ante*, sect. 2.

² 3 Washb. on Real Prop. 55, 59; *Banks v. Ogden*, 2 Wall. 69; *Saulet v. Shepherd*, 4 Wall. 505; *Municipality v. Orleans Cotton Press*, 18 La. 122.

away of the soil on one side of the stream and the transportation of the particles to the other side, or by their deposit on the same side below. All such accretions become a part of the land upon which they are cast, and the property of the owner of the soil.¹ But the title to such accretions does not rest upon the mere fact of attachment to the soil, although such attachment is a necessary element. It rests rather upon the fact that the former owner is unable to identify his property. Alluvion is the gradual formation of soil by the deposit of particles and atoms of soil, which, from the very nature of the case, the former owner cannot identify in the new shape which they have assumed. But if by some sudden *avulsion*, a distinct and tangible part of the soil of one man's land is detached and deposited upon another's premises, the latter acquires no title thereto by the mere act of deposit. The former owner can still identify it, and prove his property. But if he should permit such soil to remain upon the land sufficiently long to become permanently attached, his right of property will be lost, because its removal after such delay would probably injure the land.²

§ 687. **Filum Aquæ.** — Where two tracts of land are divided by a navigable stream, the general rule is that the boundary line is the low water mark on the adjoining shore, and the soil or bed of the stream is the property of the State.³ But if the stream is not navigable, the boundary line is the

¹ 3 Washb. on Real Prop. 55; *Emans v. Turnbull*, 2 Johns. 322; *Anthony v. Gifford*, 2 Allen, 550; *St. Louis Public Schools v. Risley*, 40 Mo. 356; *New Orleans v. United States*, 10 Pet. 662; *Jones v. Souldard*, 24 Hqw. 41; *Krant v. Crawford*, 18 Iowa, 549; *Barrett v. New Orleans*, 13 La. An. 105; *Ingraham v. Wilkinson*, 4 Pick. 273; *Giraud v. Hughes*, 1 Gill & J. 249.

² 3 Washb. on Real Prop. 59; Ang. Wat. Cour., sect. 60; Inst. L. II. Tit. 1, sect. 21; *Hawkins v. Barney*, 5 Pet. 467; *Woodbury v. Short*, 17 Vt. 387; *Dikes v. Miller*, 24 Tex. 424; *Trustees, etc. v. Dickinson*, 9 Cush. 544; *Halsey v. McCormick*, 18 N. Y. 147.

³ See *post*, sect. 835, for definition of a navigable stream.

centre of the current of the stream, commonly called the *filum aquæ*, and the owners of the shore have a right of property in the bed of the stream up to this *filum aquæ*.¹ If, therefore, an island rises in the current of a non-navigable stream, under the doctrine of accretion, it would become the property of him on whose soil it is formed. If the island is formed in the middle of the stream, the proprietors of the opposite shores would acquire a title in severalty to that part of the island which lies on their respective sides of the *filum aquæ*.² But if the stream is navigable, since the right of property in the bed of the stream is vested in the State, an island forming in the current of the stream belongs to the State, and the owners of the shore are only entitled to whatever alluvion is deposited on their shore above low water mark.³ So also if, by some sudden change in the current of the navigable river, what was once the bed is left uncovered, the property in the soil remains in the State. The owner of the shore does not acquire the title thereto, as he does to gradual and ordinary accretions, resulting from usual and natural changes in the current.⁴

¹ 3 Washb. on Real Prop. 55, 56. For a more extended discussion of this entire subject, see *post*, sects. 833-835.

² 3 Kent's Com. 428; 3 Washb. on Real Prop. 56, 57, 58; Walk. Am. Law, 329; Chase's Bla. Com. 416 n; Ingraham v. Wilkinson, 4 Pick. 268; Deerfield v. Arms, 17 Pick. 41; Trustees, etc., v. Dickinson, 9 Cush. 544; Adams v. Frothingham, 3 Mass. 352; Woodbury v. Short, 17 Vt. 387; Halsey v. McCormick, 18 N. Y. 147; Primm v. Walker, 38 Mo. 99; King v. Yarborough, 3 B. & C. 91.

³ 3 Washb. on Real Prop. 58; Chase's Bla. Com. 416 n; Attorney-General v. Chambers, 4 De G. M. & G. 206-218; Seratton v. Brown, 4 B. & C. 495; King v. Yarborough, 1 Gow. & C. 178; *s. c.*, 3 B. & C. 91.

⁴ Emans v. Turnbull, 2 Johns. 322; Halsey v. McCormick, 18 N. Y. 147. See Trustees, etc., v. Dickinson, 9 Cush. 544.

SECTION III.

TITLE BY ADVERSE POSSESSION.

- SECTION 692. Effect of naked possession.
693. Seisin and disseisin.
694. Disseisin and dispossession distinguished.
695. Actual and constructive possession.
696. Actual or constructive possession — Continued.
697. What acts constitute actual possession — Visible or notorious.
698. Possession must be distinct and exclusive.
699. Possession — Hostile and adverse.
700. Adverse possession, when entry was lawful.
701. Disseisor's power to alien.
702. Betterments.
703. Title by adverse possession — How defeated.
704. Title by adverse possession — How made absolute.

§ 692. **Effect of naked possession.** — It is an undisputed rule of law that naked possession, *i.e.*, possession without even a claim of title, vests a sufficient right of property in the person who has such possession, as to permit him to hold the land against all the world except the true owner.¹ But he does not in strict technical language, by the mere fact of possession, acquire a title to the land, and certainly not against the true owner. Such possession may be as licensee, bailee or tenant of the real owner, or in some other way subordinate to the latter; and under such circumstances his possession is the possession of the owner. In order that his possession may vest in him a title to the land, it must be adverse to, and independent of, the real owner. What is adverse possession will appear in the following paragraphs.

¹ 3 Washb. on Real Prop. 114; 2 Sharsw. Bla. Com. 196 n.

§ 693. **Seisin and disseisin.**—Seisin, as has been explained in a preceding chapter,¹ is that possession which accompanies, and which is an incident of, freehold estates. Seisin is of two kinds, *seisin in fact*, which is equivalent to actual possession, and *seisin in law or deed*, being that seisin or right to seisin, which one acquires by the delivery and acceptance of a deed, or which is retained by the owner, when he parts with his possession to the tenant of a leasehold or other subordinate estate, or in any other case where he has not the actual possession.² In this connection we are not concerned with the distinctions between freehold and leasehold estates in respect to the appropriate use of the term seisin. On the contrary, in respect to the matter under consideration, the terms *seisin* and *possession* may be treated as synonymous, meaning that possession which accompanies, and is held under, a claim of title.³ There cannot, however, be more than one seisin, and where, therefore, two persons are in possession, he has the seisin who can show a good title.⁴ When one is in possession of the land, and his possession is subordinate to the claims of the real owner, although the latter has not the *seisin in fact*, he still has the *seisin in law*, for the possession of the former is subordinate and supports the seisin in law. The tenant is for that purpose a *quasi*-bailee of the owner. But, if the one in possession holds the land in opposition to the claims of the owner, and under the assertion of a superior title, then the real owner is deprived of his seisin; for the seisin in law can only exist, apart from the seisin in fact, when the actual possession is held by another subject to the

¹ See *ante*, sect. 24.

² Co. Lit. 153; 2 Prest. Abst. 282. See *ante*, sect. 25.

³ 3 Washb. on Real Prop. 117; Slater v. Rawson, 6 Metc. 439; Smith v. Burtis, 6 Johns. 216.

⁴ 2 Prest. Abst. 286, 290, 4 Kent's Com. 482; Barr v. Gratz, 4 Wheat. 213; Codman v. Winslow, 10 Mass. 146; Brimmer v. Long Wharf, 5 Pick. 131; Stevens v. Hollister, 18 Vt. 294; Smith v. Burtis, 6 Johns. 216; Whittington v. Wright, 9 Ga. 23.

superior claims of the owner. The real owner is then said to be *disseised*; the act which deprives him of the seisin is a *disseisin*, and the actor is a *disseisor*. Disseisin vests in the disseisor a title to the land, and leaves in the disseisee only a right of entry, which is practically but a *chose in action*. Disseisin is synonymous with adverse possession.¹ So completely does disseisin divest the owner of his estate, that at common law he had nothing which he could convey; nor could he maintain an action for trespass upon the land, or for other injuries thereto. The disseisor could alone maintain such actions. Says Mr. Preston: "Disseisin is the privation of seisin. It takes the seisin or estate from one man and places it in another. It is an ouster of the rightful owner of his seisin. It is the commencement of a new title, producing that change by which the estate is taken from the rightful owner and is placed in the wrongdoer. Immediately after a disseisin, the person, by whom the disseisin is committed, has the seisin or estate, and the person on whom the injury is committed has merely the right or title of entry." Again: "As soon as a disseisin is committed, the title consists of two divisions; *first*, the title under the estate or seisin, and, *secondly*, the title under the former ownership."² And since the disseisor claims the land independent of all others, his estate cannot be less than an absolute and unqualified fee.³

¹ "Disseisin and ouster mean very much the same thing as adverse possession," say the court in *Magee v. Magee*, 37 Miss. 151. See *Slater v. Rawson*, 6 Metc. 439; *Cornell v. Jackson*, 3 Cush. 508; *Smith v. Burtis*, 6 Johns. 216; *Holley v. Hawley*, 39 Vt. 531; Ang. on Lim. 410; Com. Dig. Seisin, A. 1, A. 2.

² 2 Prest. Abst. 284. See also, 3 Washb. on Real Prop. 292-295; Rawle, Cov. (3d ed.) 23, 24; *Parker v. Prop. of Locks, etc.*, 3 Metc. 98; *Bradstreet v. Huntington*, 5 Pet. 402; 2 Smith Ld. Cas. 529, 530, 531.

³ Co. Lit. 271 a; 2 Prest. Abst. 293; *Wheeler v. Bates*, 21 N. H. 460; *McCall v. Neely*, 3 Watts, 71. Query: If one enters into possession under the claim of a long term of years, or an estate for life, or an estate tail, will not this qualification of the claim of title under which he enters limit the estate which he would acquire by disseisin or adverse possession?

§ 694. **Disseisin and dispossession distinguished.** — It is not every dispossession which constitutes a disseisin. In the first place, a dispossession may be effected under a complete and lawful title; a disseisin is always a wrongful dispossession, *i.e.*, it is never supported by a good title.¹ Nor is even every wrongful dispossession a disseisin. In order that a wrongful dispossession may constitute a disseisin, the possession thus acquired must be *actual* or *constructive*, *visible* or *notorious*, *distinct* and *exclusive*, *hostile* or *adverse*.²

§ 695. **Actual or constructive possession.** — Possession may be actual or constructive. Thus, where one receives a deed of conveyance, by the very delivery of the deed, he is considered as being in constructive possession of the land, although he has not acquired the actual possession. So, also, does the heir or devisee acquire constructive possession by force of the descent cast or the devise. Such a grantee, heir or devisee, acquires the seisin in law, and the constructive possession, raised by implication of law, is but the consequence of the transfer of this seisin. Seisin in law and constructive possession may for all practical purposes be considered synonymous.³ But where there is an

¹ Slater v. Rawson, 6 Metc. 439; Smith v. Burtis, 6 Johns. 216.

² 4 Kent's Com. 488; 2 Smith Ld. Cas. 529, 560, 561; Melvin v. Proprs. of Locks, etc., 5 Metc. 15; Smith v. Burtis, 5 Johns. 218; Calhoun v. Cook, 9 Pa. St. 226; Cook v. Babcock, 11 Cush. 210; Thomas v. Marshfield, 13 Pick. 250; Little v. Downing, 37 N. H. 367; Grant v. Fowler, 39 N. H. 101; Daswell v. De La Lanza, 20 How. 32; Bradstreet v. Huntington, 5 Pet. 439; Ewing v. Burnett, 11 Pet. 41; Hawk v. Senseman, 6 Serg. & R. 21; Jackson v. Wheat, 18 Johns. 44; Armstrong v. Ristean, 5 Md. 256; Clarke v. McClure, 10 Gratt. 305; Magee v. Magee, 37 Miss. 152; Gordon v. Sizer, 39 Miss. 820; Wiggins v. Holley, 11 Ind. 2; Wright v. Keithler, 7 Iowa, 92; Robinson v. Lake, 14 Iowa, 424; Snoddy v. Kreutch, Head, 304; Turney v. Chamberlain, 15 Ill. 271.

³ Co. Lit. 153; 2 Prest. Abst. 282; Barr v. Gratz, 4 Wheat. 213; Green v. Liter, 8 Cranch, 229; Wyman v. Brown, 50 Me. 160; Wells v. Prince, 4 Mass. 64; Higbee v. Rice, 5 Mass. 344; Hodges v. Eddy, 38 Vt. 34; Caldwell v. Fulton, 44 Pa. St. 475; Effinger v. Lewis, 32 Pa. St. 367; Matthews v. Ward, 10 Gill & J. 443; Breckinridge v. Ormsby, J. J. Marsh. 244.

✓ *actual adverse* possession by one, there can be no constructive possession acquired by another. “Two persons cannot be in adverse constructive possession of the same land at the same time.”¹ And in order that a disseisin may be effected, there must be an actual occupation of the land to some extent. The simple acceptance of a title by deed adverse to the rightful owner will not work a disseisin, unless an actual entry is made upon the land.² But when an actual occupation of a part of the premises has taken place, then the doctrine of constructive possession will, under certain circumstances, apply, and extend the disseisin beyond that part of the land which is in the actual possession of the disseisor. If possession is taken under no color of title, the disseisin extends no farther than the actual possession.³

§ 696. Actual or constructive possession — Continued.

On the other hand, where entry is made under color of title, *i.e.*, under some instrument of writing, such as a deed or will, which purports to convey a title, the actual entry will place him in constructive possession of the whole tract of land described in the instrument; and this, too, where there is no doubt as to the invalidity of the deed, whether such invalidity arises from a defective execution, or a de-

¹ 3 Washb. on Real Prop. 118; *Hodges v. Eddy*, 38 Vt. 344.

² *Putnam Schools v. Fisher*, 38 Me. 324; *Cook v. Babcock*, 11 Cush. 210; 3 Smith Ld. Cas. 561; *Little v. Downing*, 37 N. H. 367; *Robinson v. Lake*, 14 Iowa, 424; *Calhoun v. Cook*, 9 Pa. St. 226; *Armstrong v. Risteau*, 5 Md. 256; *Turney v. Chamberlain*, 15 Ill. 231; *Fugate v. Pina*, 49 Mo. 441.

³ *Brimmer v. Longwharf*, 5 Pick. 131; *Blood v. Wood*, 1 Metc. 528; *Hatch v. Vt. Central R. R.*, 28 Vt. 142; *Hodges v. Eddy*, 38 Vt. 345; *Smith v. Hosmer*, 7 N. H. 436; *Jackson v. Schoonmaker*, 2 Johns. 230; *Bailey v. Carleton*, 13 N. H. 9; *Brandt v. Ogden*, 1 Johns. 156; *Sharp v. Brandon*, 15 Wend. 597; *Den v. Hunt*, Spenc. 487; *Miller v. Shaw*, 7 Serg. & R., 129; *Cluggage v. Duncan*, 1 *Id.* 113; *Piper v. Lodge*, 16 *Id.* 231; *Davidson v. Beatty*, 3 Har. & McH. 594; *Sicard v. Davis*, 6 Pet. 124; *Cresap v. Huston*, 9 Gill, 269; *Morrison v. Hays*, 19 Ga. 294; *Steedman v. Hilliard*, 3 Rich. 101; *Slice v. Derrick*, 2 Rich. 627; *Hanna v. Renfro*, 32 Miss. 129; *Musick v. Barney*, 49 Mo. 458; *Goewey v. Urig*, 18 Ill. 238.

fective title in the grantor.¹ But a mere quit-claim deed, releasing all one's interest in the land, will not be sufficient color of title to give the disseisor constructive possession of the part not in actual possession. Only such deeds are generally color of title, as the term is here understood and employed, which operate as a primary conveyance.² But a deed, which is in form a quit-claim, may operate as a primary conveyance, where the possession is transferred with it.³ In order that the rightful owner may be divested of the whole tract described in the deed, the partial occupation must be of such a character as to give rise to a reasonable presumption, that the owner knows that the entry was made under color of title. If this presumption be not reasonable under the circumstances of the case, the disseisin will not extend beyond the actual occupation. Thus if the title was only void as to a part of the land conveyed, the occupation of that part to which the grantor had title will not give the grantee constructive possession of the other part, to which he has no title, so as to disseise the real owner.⁴

¹ 2 Smith's Ld. Cas. 563; Brackett, Petitioner, 53 Me. 228; *Swift v. Gage*, 26 Vt. 224; *Spaulding v. Warren*, 25 Vt. 316; *Farrar v. Fessenden*, 39 N. H. 279; *Hoag v. Wallace*, 28 N. H. 547; *Barr v. Gratz*, 4 Wheat. 213; *Ellicott v. Pearl*, 10 Pet. 412; *Gardner v. Gooch*, 48 Me. 492; *Jackson v. Newton*, 18 Johns. 355; *Green v. Lighter*, 8 Cranch, 250; *Kennebeck Purchase v. Springer*, 4 Mass. 416; *Ament v. Wolf*, 33 Pa. St. 331; *Eifert v. Read*, 1 Mott & McC. 364; *Anderson v. Darby*, 1 Mott & McC. 369; *Royall v. Lisle*, 15 Ga. 545; *Hoy v. Swan*, 5 Md. 537; *Fugate v. Pina*, 49 Mo. 441; *Musick v. Barney*, 49 Mo. 458; *Fairman v. Beal*, 14 Ill. 244; *Hardisty v. Glenn*, 32 Ill. 64; *Brooks v. Bruyn*, 35 Ill. 394; *Jakeway v. Barrett*, 38 Vt. 323; *Russell v. Irwin*, 38 Ala. 48; *Prescott v. Nevers*, 4 Mason, 326; *Dillingham v. Brown*, 38 Ala. 311.

² *Woods v. Banks*, 14 N. H. 111.

³ *Minot v. Brooks*, 16 N. H. 376. See generally *Pillow v. Roberts*, 13 How. 472; *Jackson v. Elston*, 12 Johns. 454; *French v. Rollins*, 21 Me. 372; *Moss v. Scott*, 2 Dana, 275; *Welborn v. Anderson*, 37 Miss. 162; *Charles v. Saffold*, 13 Texas, 94; *Wofford v. McKinna*, 23 Texas, 46; *Hicks v. Coleman*, 25 Cal. 131; *Kimball v. Lohmas*, 31 Cal. 154.

⁴ *Bailey v. Carleton*, 12 N. H. 9. See *Little v. Mequirer*, 2 Me. 176; *Jackson v. Woodruff*, 1 Cow. 286; *Jackson v. Richards*, 6 Cow. 617; *Sharp v.*

And it would seem reasonable that the term *color of title* should apply only to deeds and other instruments of conveyance, which have been recorded.¹ So, also, if the deed conveys two separate and distinct parcels of land, entry and actual occupation of one tract will not give constructive possession of the other.²

§ 697. **What acts constitute actual possession — Visible or notorious.** — No particular act or series of acts are necessary to be done on the land, in order that the possession may be actual. Any visible or notorious acts, which clearly evidence the intention to claim ownership and possession, will be sufficient to establish the claim of adverse possession.³ A clandestine use of the premises, of so secret a character that the owner is not likely to know of it, will not constitute a disseisin. The occupation must be so notorious and open, that the owner may be presumed to have notice of it and of its extent.⁴ There are some acts, so notorious in their character, that they raise a conclusive presumption of notice to the owner of the adverse claim. Such are the maintenance of fences and other substantial enclos-

Brandon, 15 Wend. 599; Chandler v. Spear, 22 Vt. 388; White v. Burnley, 20 How. 235; Cluggage v. Duncan, 1 Serg. & R. 111; Smith v. Ingram, 7 Ired. 175; Osborne v. Ballew, 12 Ired. 373; Seigle v. Louderbaugh, 5 Pa. St. 490.

¹ Hodges v. Eddy, 38 Vt. 345.

² Grimes v. Ragland, 28 Ga. 123.

³ Ellicott v. Pearl, 10 Pet. 412; Ewing v. Burnett, 11 Pet. 41; Bailey v. Carleton, 12 N. H. 9; La Frombois v. Jackson, 8 Cow. 604; Blood v. Wood, 1 Metc. 528; Faught v. Holway, 50 Me. 24; Ford v. Wilson, 35 Miss. 504; Royal v. Lisle, 15 Ga. 545; Langworthy v. Myers, 4 Iowa, 18; Bates v. Norcross, 14 Pick. 224.

⁴ 2 Smith Ld. Cas. 563; Cook v. Babcock, 11 Cush. 210; Pray v. Pierce, 7 Mass. 383; Thomas v. Marshfield, 13 Pick. 250; Atherton v. Johnson, 2 N. H. 84; School Dist. v. Lynch, 33 Conn. 330; Doe v. Campbell, 10 Johns. 477; Doolittle v. Tice, 41 Barb. 181; Denham v. Holeman, 26 Ga. 191; Benje v. Creagh, 21 Ala. 151; Brown v. Cockerell, 33 Ala. 47; Alexander v. Polk, 39 Miss. 755.

ures, and the erection of buildings.¹ But in the case of the erection of buildings, without other accompanying acts of ownership, the disseisin would only extend to the land covered by the buildings, together with the necessary right of ingress and egress.² Merely surveying the land, and causing a line to be run around it, and lopping or slashing trees to indicate the course of the line, will not be sufficient. The enclosure must in all ordinary cases be substantial.³ But there are cases where an enclosure is not necessary. Notice of possession may then be presumed from other acts of ownership. So, also, where the property is of such a character, and is so circumstanced, that there can be neither actual permanent occupation nor residence, on account of its incapacity to receive any permanent improvement, these acts will not be necessary. The disseisin may be manifested by any other public acts of ownership which were possible with property of that kind.⁴ Very often the Stat-

¹ *Poignard v. Smith*, 6 Pick. 172; *Cutter v. Cambridge*, 6 Allen, 20; *Bennett v. Clemence*, 6 Allen, 18; *Bates v. Norcross*, 14 Pick. 224; *Jackson v. Wasford*, 7 Wend. 62; *Erwin v. Olmsted*, 7 Cow. 229; *Lane v. Gould*, 10 Barb. 254; *Stedman v. Smith*, 8 E. & Bl. 1. But in the case of the erection of buildings without other accompanying acts of ownership, the disseisin would only extend to the land covered by the buildings, together with the necessary right of ingress and egress. *Poignard v. Smith*, 6 Pick. 172; *Bennett v. Clemence*, 6 Allen, 18; *Erwin v. Olmsted*, 7 Cow. 229; *Stedman v. Smith*, 8 E. & Bl. 1.

² *Poignard v. Smith*, 6 Pick. 172; *Bennett v. Clemence*, 6 Allen, 18; *Erwin v. Olmsted*, 7 Edw. 229; *Stedman v. Smith*, 8 E. & Bl. 1.

³ *Kennebec Purchase v. Springer*, 4 Mass. 416; *Coburn v. Hollis*, 3 Metc. 125; *Slater v. Jepherson*, 6 Cush. 129; *Bates v. Norcross*, 14 Pick. 224; *Parker v. Parker*, 1 Allen, 245; *Smith v. Hosmer*, 7 N. H. 436; *Hale v. Glidden*, 10 N. H. 397; *Stevens v. Taft*, 11 Gray, 35; *Stevens v. Hollister*, 18 Vt. 294; *Jackson v. Schoonmaker*, 2 Johns. 230; *Lane v. Gould*, 10 Barb. 254; *Smith v. Burtis*, 6 Johns. 218; *Den v. Hunt*, Spenc. 487; *O'Hara v. Richardson*, 46 Pa. St. 391; *Slico v. Derrick*, 2 Rich. 627; *Smith v. Mitchel*, 1 A. K. Marsh. 207; *Hutton v. Schumaker*, 21 Cal. 453; *Borel v. Rollins*, 30 Cal. 415.

⁴ *Ewing v. Burnett*, 11 Pet. 41; *Blood v. Wood*, 1 Metc. 528; *Bailey v. Carleton*, 12 N. H. 9; *Thacker v. Gardener*, 7 Metc. 484; *Carbrey v. Willis*, 7 Allen, 370; *La Frombois v. Jackson*, 8 Cow. 604; *Millett v. Fowle*, 8 Cush., 150; *Faught v. Holway*, 50 Me. 24; *Den v. Hunt*, Spenc. 487; *Royall v. Lisle*, 15 Ga. 545.

utes of Limitations in the different States state expressly what acts will constitute a visible or notorious possession, and what will not. Wherever there are such provisions, they will supersede the presumptive conclusions of law explained and presented in this paragraph.

§ 698. **Possession must be distinct and exclusive.** — The possession must also be distinct and exclusive, *i.e.*, the owner must be actually ousted of possession. A joint possession, even though adverse to each other, will not be a disseisin. Where two are in possession, the seisin follows the title, and there can be no disseisin, unless the rightful owner is altogether deprived of possession.¹ If the wrong-doer disturbs the real owner by his entry and joint possession, the latter may elect to consider himself disseised, and by abandoning possession may bring his action of ejectment. But disseisin by election is not sufficient to create such an adverse possession as will ripen into a good title. In order that the disturbance of possession may be treated by the owner as a disseisin, he must abandon the possession which he has. If he does not elect to abandon the premises to the intruder, the intrusion of the wrong-doer does not work a disseisin.² But the wrong-doer need not be in exclusive possession of the entire premises. His exclusive possession of a part, if he only claims title to that part, will work a disseisin as to that part as effectually as if the owner

¹ *Hawk v. Senseman*, 6 Serg. & R. 21; *Calhoun v. Cook*, 9 Pa. St. 226; *Cahill v. Palmer*, 45 N. Y. 484; *Melvin v. Prop'rs, etc.*, 5 Metc. 15; *Armstrong v. Risteau*, 5 Md. 256; *Turney v. Chamberlain*, 15 Ill. 271; *Peterson v. McCullough*, 50 Ind. 35; *Crispen v. Hannavan*, 50 Mo. 536; *Gillespie v. Jones*, 26 Texas, 343; *Booth v. Small*, 25 Iowa, 177; *Thompson v. Pioche*, 44 Cal. 508; *Slater v. Rawson*, 6 Metc. 439; *Smith v. Burtis*, 6 Johns. 216; *Barr v. Gratz*, 4 Wheat. 213; *Stevens v. Hollister*, 18 Vt. 294; *Whittington v. Wright*, 9 Ga. 23.

² *Taylor v. Horde*, 1 Burr. 60; *Doe v. Hull*, 2 D. & R. 38; *Prop'rs v. McFarland*, 12 Mass. 327; *Munro v. Ward*, 4 Allen, 150; *Burns v. Lynda*, 6 Allen, 312; *Smith v. Burtis*, 6 Johns. 215.

had been driven out of possession of the whole tract of land.¹

§ 699. **Possession — Hostile and adverse.** — Under the early common law, it was required that the disseisor should be recognized by the lord of the manor, and his other tenants, as one of the peers of the baron's court, in order that a complete disseisin may be effected. But this rule has long since become obsolete in England, and never did exist in this country.² And instead of this complicated process, it is now only required that the possession should be *hostile* and *adverse* to the rightful owner.³ That is, it must be held under a claim of title which is adverse to the disseisee's title, and the intention must be to resist the title of the latter.⁴ If this intention to claim a *hostile* and *adverse* title is not established, the dispossession is only a trespass, and, however long continued, will not make a disseisin.⁵ But there need not be a wilful entry to deprive the owner of what is lawfully his. All that is necessary is to show an

¹ Kellogg v. Mullen, 39 Mo. 174; Tamm v. Kellogg, 49 Mo. 118; Soule v. Barlow, 49 Vt. 329; Russell v. Maloney, 39 Vt. 583; Bartholomew v. Edwards, 1 Houst. 17; Den v. Hunt, 20 N. J. L. 487.

² Co. Lit. 266 b, Butler's note, 217; 3 Washb. on Real Prop. 126; 2 Prest. Abst. 284.

³ Newhall v. Wheeler, 7 Mass. 189; Coburn v. Hollis, 3 Metc. 125; Slater v. Rawson, 6 Metc. 439; Lund v. Parker, 3 N. H. 49.

⁴ Bradstreet v. Huntington, 5 Pet. 439; Ewing v. Burnet, 11 Pet. 41; Smith v. Burtis, 6 Johns. 218; Russell v. Davis, 38 Conn. 562; Beatty v. Mason, 30 Md. 409; Clark v. McClure, 10 Gratt. 305; Carroll v. Gillion, 33 Ga. 539; Snoddy v. Kreutch, 3 Head, 304; Gordon v. Sizer, 39 Miss. 820; Wiggins v. Holly, 11 Ind. 2; Musick v. Barney, 49 Mo. 458; McGee v. Morgan, 1 A. K. Marsh. 62; Jackson v. Birney, 48 Ill. 203; Grube v. Wells, 34 Iowa, 150.

⁵ Putnam School v. Fisher, 38 Me. 324; Grant v. Fowler, 39 N. H. 101; Hodges v. Eddy, 41 Vt. 488; Morse v. Churchill, *ib.*, 649; Church v. Burghart, 8 Pick. 328; Jackson v. Wheat, 18 Johns. 44; Brandt v. Ogden, 1 Johns. 156; Russell v. Davis, 38 Conn. 562; Beatty v. Mason, 30 Md. 409; Carroll v. Gillion, 33 Ga. 539; Magee v. Magee, 37 Miss. 152; Cook v. Babcock, 11 Cush. 210; Jones v. Hockman, 12 Iowa, 108; Grube v. Wells, 34 Iowa, 148; Musick v. Barney, 49 Mo. 458; McGee v. Morgan, 1 A. K. Marsh. 62; Jackson v. Birney, 48 Ill. 203.

unequivocal claim of title adverse to the real owner. And if the claim is made under a mistake of fact or law, and the alleged disseisor honestly believes the land to belong to him, it will be just as much an act of disseisin as if it had been done knowingly, and with the express purpose to defraud the rightful owner.¹ (An apparent exception to this rule arises where one occupies land up to a certain line, whether indicated by a fence or not, under a mistaken belief that it was the true line, but with no intention to claim beyond the actual line, or legal boundary. Such possession will not be deemed so adverse as to cause the Statute of Limitations to run against the rightful claim.²) But if the adjoining owners orally agreed upon a dividing line as the true line, the possession would be adverse to the line so agreed upon, and would ripen into a good title by the lapse of time. But not so, if they merely agreed to build a fence for convenience, and without any intention to consider it the true line.³ As a general proposition, any acts of ownership exercised by the wrong-doer, which would make his possession sufficiently visible and notorious as to raise the presumption of notice to the owner of such adverse holding, will be ample evidence of the adverse claim of title, and actual notice to the owner or an express claim or affirmation of such claim of title is not required to establish its existence. But such a possession never raises a conclusive presumption of an adverse claim. It is only *prima facie* proof of it, and may be rebutted by the proof of other facts, which show that the

¹ Johnson v. Gorham, 38 Conn. 521; Bryan v. Atwater, 5 Day, 181; Robinson v. Phillips, 65 Barb. 418; s. c., 56 N. Y. 634; Russell v. Maloney, 39 Vt. 583; Faught v. Holway, 50 Me. 24.

² Huntington v. Whaley, 29 Conn. 391; Holton v. Whitney, 30 Vt. 410; Howard v. Reedy, 29 Ga. 154; Brown v. Cockerill, 33 Ala. 45; St. Louis University v. McCune, 28 Mo. 481.

³ Burrell v. Burrell, 11 Mass. 294; Doe v. Bird, 11 East, 49; Bradstreet v. Huntington, 5 Pet. 439; Russell v. Maloney, 39 Vt. 578; Smith v. Hosmer, 7 N. H. 436; Duke v. Harper, 6 Yerg. 285.

holding was not intended to be adverse to the rightful owner. And where the character of the possession, *i.e.*, whether subordinate or adverse, is doubtful, the presumption of law is that it is subordinate and not adverse to the lawful owner.¹

§ 700. **Adverse possession, when entry was lawful.** — It is a legal maxim that when once the seisin is proved to be in one, it will be presumed to continue in that person until the presumption is overthrown by the proof of facts inconsistent therewith.² If, therefore, the entry is made with the consent of the owner, and subservient to his claim of title, the law will presume that the continued possession is subordinate to the superior title of the owner. So it has been held where one enters under a bond for a deed without paying the consideration, or with the intent to purchase, and not to claim adverse title to the owner.³ But if the purchase money has been paid, the possession is presumed to be adverse.⁴ Such also is the rule in regard to the possession of the joint estate by one of several tenants in common.⁵ Such also is the case with the possession of the *cestui que trust* and trustee under the trust.⁶ They are both subor-

¹ *Smith v. Burtis*, 6 Johns. 218; *Jackson v. Sharp*, 9 Johns. 163; *Stevens v. Taft*, 11 Gray, 36; *Smith v. Hosmer*, 7 N. H. 436; *Pipher v. Lodge*, 16 Serg. & R. 229; *Pierson v. Turner*, 2 Ind. 123; *Alexander v. Polk*, 39 Miss. 755.

² *Long v. Mast*, 11 Pa. St. 189; *Babcock v. Utter*, 1 Abb. App. 27; *Stephens v. McCormick*, 5 Bush, 181.

³ *Knox v. Hook*, 12 Mass. 329; *Brown v. King*, 5 Metc. 173; *Vrooman v. Shepherd*, 14 Barb. 441; *Den v. Kip*, 26 N. J. L. 351; *Ripley v. Yale*, 18 Vt. 220; *Stamper v. Griffin*, 12 Ga. 450; *Ormond v. Martin*, 37 Ala. 604; *McClannahan v. Barrow*, 27 Miss. 664.

⁴ *Brown v. King*, 5 Metc. 173.

⁵ *McClung v. Ross*, 5 Wheat. 124; *Zeller's Lessee v. Eckert*, 4 How. 295; *Bennett v. Bullock*, 35 Penn. 364; *Peters v. Jones*, 35 Iowa, 512; *Challefoux v. Ducharme*, 8 Wis. 287; *Owen v. Morton*, 24 Cal. 376; *Alexander v. Kennedy*, 19 Texas, 488. See *ante*, sect. 251.

⁶ *Smith v. King*, 16 East, 283. That is, the *cestui que trust* may disseise his trustee and divest him of his legal estate, if the intention to disseise is manifest, although his possession is usually presumed to be subject to the

ordinate, and where one holds over after the termination of a lawful estate he is tenant at sufferance, and does not by such holding over disseise the reversioner.¹ But these legal presumptions in the different cases mentioned are all disputable presumptions; and although it has been held that adverse possession cannot be acquired by one co-tenant against the others, yet now it is the universal rule that in any of the above mentioned cases of lawful entry the lawful and subordinate holding may be changed to a hostile and adverse possession by a distinct and unequivocal disavowal of the owner's superior title, and actual notice to him of such disclaimer. In all these cases the disavowal or disclaimer must be accompanied and established by visible and notorious acts, inconsistent with the ownership of the supposed disseisee, such as a refusal to recognize the claim to the profits, or a share therein.²

§ 701. **Disseisor's power to alien.**—It is generally accepted, that mere naked possession will be sufficient to enable the one in possession to make a deed of conveyance with or without covenants of warranty, and the grantee would thereby acquire a good title which can only be defeated by the true owner. So much the more certain is it that, where such possession amounts to a disseisin, and the intruder has therefore gained a title even against the real owner, the disseisor has sufficient seisin to convey the estate.³ In fact,

trust. *Whiting v. Whiting*, 4 Gray 241. But in no case will the possession of the trustee be deemed to be adverse to the *cestui que trust*. He cannot disseise the *cestui que trust*. *Zeller's Lessee v. Eckert*, 4 How. 295; *Decouche v. Savetier*, 3 Johns. Ch. 216. But a disseisin of the trustee will work a disseisin of the *cestui que trust*. See *ante* sect. 451.

¹ See *ante*, sect. 226.

² *Lafavour v. Homan*, 3 Allen, 355; *Roberts v. Morgan*, 30 Vt. 319; *Holley v. Hawley*, 39 Vt. 534; *Jackson v. Moore*, 13 Johns. 516; *Ripley v. Bates*, 110 Mass. 162; *Kinsman v. Loomis*, 11 Ohio, 475; *Melling v. Leak*, 16 C. B. 652. See *ante*, sects. 226, 251, 326.

³ *Currier v. Gale*, 9 Allen, 525; *Slater v. Rawson*, 6 Metc. 439; *Hubbard v. Little*, 9 Cush. 475; *Overfield v. Christie*, 7 Serg. & R. 173. See *Christy v.*

according to the common law, he alone had the power to make a conveyance. The disseisee had nothing but a *chose in action*, which was not assignable.¹ The estate also descends to the disseisor's heirs, and at common law the descent cast in such a case vested in the heirs so complete a title, that the right of entry was taken away, and the estate could only be defeated by an action for recovery of the possession.²

§ 702. **Betterments.**—At common law if a *bona fide* holder of a defeasible title made improvements, while he was in possession of the land, he could not claim compensation for them from the rightful owner. The improvements became a part of the realty, since they were attached without the consent of the lawful owner. Nor could a *bona fide* disseisor claim the right to remove them.³ But where the real owner in his ejectment suit asked for a judgment for *mesne* profits, the *bona fide* disseisor could off-set the same by his claim for his improvements.⁴ Statutes however have been passed in some of the States enabling the disseisor to bring an original action for improvements.⁵

Alford, 17 How. 601; Haynes v. Boardman, 119 Mass. 414; Alexander v. Stewarts, 50 Vt. 87; Schrack v. Zubler, 34 Pa. St. 38; Kruse v. Wilson, 29 Ill. 233.

¹ See *post*, sect. 795.

² 3 Washb. on Real Prop. 130; Co. Lit., 238 a; Smith v. Burtis, 6 Johns. 217.

³ Powell v. M. & B. Mfg. Co., 3 Mason, 369; 2 Kent's Com. 334-338; West v. Stewart, 7 Pa. St. 122; *ante*, sect. 2.

⁴ Murray v. Gouverneur, 2 Johns. 438; Jackson v. Loomis, 4 Cow. 168; Green v. Biddle, 8 Wheat. 181; Beverley v. Burke, 9 Ga. 440; Matthews v. Davis, 6 Humph. 324; Worthington v. Young, 8 Ohio, 401; Burrows v. Pierce, 6 La. An. 303.

⁵ 3 Pars. on Con. 221; Cooley on Torts, 433; 2 Kent's Com. 335. See Bright v. Boyd, 1 Story, 494; Bailey v. Hastings, 15 N. H. 525; Martin v. Atkinson, 7 Ga. 228; Herring v. Pollard, 4 Humph. 362; Lamar v. Minter, 13 Ala. 31.

§ 703. Title by adverse possession — How defeated. —

The title which is acquired by adverse possession or by disseisin is not an absolute title. It may be defeated by the rightful owner. Disseisin leaves in the owner only a *chose in action*, for the vindication of which are provided two principal remedies. One is the right of entry without the aid of the courts, and the other is the recovery of the possession by the judgment of the court. A mere re-entry upon the land by the disseisee or by his authorized agent, with the intention to recover the seisin is sufficient to regain the seisin, even though the disseisor is not actually expelled, since the joint-possession by them destroys the element of exclusiveness, necessary to disseisin. And although a casual entry, without an intention to regain the seisin, is not sufficient for this purpose, it is not necessary for the disseisee to make any express declaration of his intention to the disseisor.¹ So also does an abandonment of the possession by the disseisor revest the seisin in the rightful owner.² Of course the seisin so gained may be again lost by an ouster, and such ouster is a re-disseisin.³ The exact form of action, where the aid of court is called into requisition, depends upon the local laws of practice. The usual remedy is the common law action of ejectment.

§ 704. Title by adverse possession — How made absolute. — Inasmuch as disseisin leaves only a *chose in action* in the disseisee, and the disseisor acquires thereby a title

¹ Peabody v. Hewett, 52 Me. 46; Brickett v. Spofford, 14 Gray, 514; Burrows v. Gallup, 32 Conn. 499; O'Hara v. Richardson, 46 Pa. St. 390.

² Melvin v. Prop'rs, etc., 5 Metc. 15; Sawyer v. Kendall, 10 Cusb. 241; Potts v. Gilbert, 3 Wash. C. Ct. 475; Cleveland v. Jones, 3 Strobb. 479 n. Unless there are two joint disseisors, when the abandonment by one would only make the other disseisor *sole seised*. Allen v. Holton, 20 Pick. 458.

³ 3 Washb. on Real Prop. 130.

good and perfect against all the world except the true owner; if, for any reason, the law takes away the right of action, the title will become absolute in the disseisor. The remedies for the recovery of real property may be barred by one of two causes, *first*, by the lapse of time under the Statute of Limitations, and *secondly*, by estoppel. These will constitute the subjects of the two following sections.

SECTION IV.

STATUTE OF LIMITATIONS.

SECTION 713. What the statute enacts.

714. Adverse possession — Continuous and uninterrupted.

715. Against whom the statute runs.

716. How and when statute operates.

717. Effect of the statute.

§ 713. **What the statute enacts.** — In general, every Statute of Limitations enacts that no action for the recovery of real property can be maintained, and no such right of entry, if any exists, can be exercised, unless instituted within the period of time limited by the statute, after the right has accrued. The first statute for the limitation of real actions was passed in 32 Hen. VIII. ch. 2, and a more general one in 21 Jac. I.¹ But the limitation of actions is governed by the *lex fori*,² and as each State in the American Union has its own Statute of Limitations, varying widely in detail, the limits of this book will only permit of a discussion of the general effect of such statutes, referring the student to the different statutes for the details. The statute, 21 Jac. I., placed the limitation of actions for the recovery of real property at twenty years from the time the right of action accrued, and this period has been more or less adopted in this country, although in a number of States the period has been reduced to ten years, while in others a different period has been established.

§ 714. **Adverse possession — Continuous and uninterrupted.** — But in all of the States the person who claims

¹ Ang. on Lim. 1-6.

² Ang. on Lim. 65.

the benefit of the statute, together with his privies, must have held adverse possession for the entire period of limitation. That is, there must not only have been an actual and complete disseisin, as explained in the preceding section, but such disseisin must be continued and uninterrupted during the statutory period. Any discontinuance or abandonment of the possession will prevent the statute from operating.¹ Any yielding of possession to the claim of the owner, or abandonment of actual possession, although with no intention to give up his claim of adverse possession; or, if at any time during the statutory period the rightful owner could not find an actual occupant against whom to bring his action of ejectment; any of these acts or incidents will constitute such a discontinuance of the disseisin or adverse possession as will prevent the operation of the statute.² But it need not be a continuous adverse possession in the one person. The title by disseisin may be assigned, and it descends to the disseisor's heirs. If, therefore, two or three disseisors hold the land successively and in privity with each other, whether by purchase or by descent, and their several periods of holding make up the requisite statutory period, the owner will be just as effectually barred as if the land had been held by one person during the entire time.³ This

¹ *Doswell v. De La Lanza*, 20 How. 32; *Thomas v. Marshfield*, 13 Pick. 250; *School District v. Lynch*, 33 Conn. 380; *Denham v. Holeman*, 26 Ga. 191; *Peabody v. Hewett*, 52 Me. 46; *Pederick v. Searle*, 5 Serg. & R. 240; *Den v. Mulford*, 1 Hayw. 320; *Winslow v. Winslow*, 52 Ind. 8; *Bowman v. Lee*, 48 Mo. 335; *McNamee v. Moreland*, 26 Iowa, 96; *San Francisco v. Fulde*, 37 Cal. 349.

² *Pederick v. Searle*, 5 Serg. & R. 240; *Den v. Mulford*, 1 Hayw. 320; *Webb v. Richardson*, 42 Vt. 465; *San Francisco v. Fulde*, 37 Cal. 349.

³ *Melvin v. Proprietors, etc.*, 5 Metc. 15; *Sawyer v. Kendall*, 10 Cush. 241; *Alexander v. Pendleton*, 8 Cranch, 462; *Doe v. Campbell*, 10 Johns. 477; *Jackson v. Leonard*, 9 Cow. 653; *Leonard v. Leonard*, 7 Allen, 227; *Doe v. Barnard*, 13 Q. B. 945; *Armstrong v. Risteau*, 5 Md. 256; *Shrack v. Zubler*, 34 Pa. St. 38; *Christy v. Alford*, 17 How. 601; *Simpson v. Downing*, 23 Wend. 316; *Doe v. Brown*, 4 Ind. 143; *Chilton v. Wilson*, 9 Humph. 399; *Johnson v. Nash*, 15 Texas, 419; *Outcalt v. Ludlow*, 32 N. J. 239; *Clock v. Gilbert*, 39

rule has been sustained and applied where the successive holders, although claiming under each other, have not acquired title by any deed or instrument in writing, but merely by parol contract.¹ But there must be privity of estate between the successive disseisors, in order that their several holdings may be tacked together to produce a continuity of adverse possession.² But in some of the States the entire doctrine is repudiated, and a continuous holding by one person or his heirs for the statutory period is required to raise a bar to the action by the owner for the recovery of his land.³

§ 715. **Against whom the statute runs.**—The statute runs against the rightful owner, and all other persons standing in privity with him. But the statute only bars the actions when the statutory period has elapsed after the time when the right of action accrued. The statute, therefore, does not begin to run against a person until he has a right to bring the action. Where the tenant of a particular estate is disseised and is barred by the statute, since the reversioner is not entitled to possession until the termination of the particular estate, the statute will not affect his right of

Conn. 94. But the possession of tenants of dower or curtesy cannot be tacked on to the possession of the husband or wife, respectively, in order to make up the statutory period of adverse possession. *Doe v. Wing*, 6 C. & P. 538, and cases cited *supra*.

¹ *Smith v. Chapin*, 31 Conn. 530.

² *Austin v. Rutland R. R.*, 45 Vt. 215; *San Francisco v. Fulde*, 37 Cal. 349; *Sheffleton v. Nelson*, 2 Sawyer, 540; *Simpson v. Downing*, 23 Wend. 316; *Shrack v. Zubler*, 34 Pa. St. 38; *Christy v. Alvord*, 17 How. 601. In Tennessee privity of estate is not necessary under the statute. It is sufficient that the owner has not been in possession during the statutory period. *Scales v. Cockrill*, 3 Head, 435. See to the same effect, *Chandler v. Lunsford*, 4 Dev. & B. 409. And see *Fanning v. Wilcox*, 3 Day, 258; *McCoy v. Dickinson College*, 5 Serg. & R. 254.

³ 3 Washb. on Real Prop. 147; *King v. Smith*, Rice, 10. This theory has lately been confirmed by the Supreme Court of South Carolina. *Ellen v. Ellen*, 16 S. C. 132.

action during the continuance of the particular estate. The disseisor acquires an absolute title to only the tenant's estate; the reversioner is only disseised from the time that the tenant's estate is at an end, and he has a right to recover the possession.¹ But the disseisin of the mortgagor is an immediate disseisin of the mortgagee, and *vice versa*.² In addition to this restriction upon the operation of the statute the statutes generally contain a saving clause, preventing the statute from running against certain persons who are under disabilities. Although there may be a different rule prevailing in one or two of the States, in order that the disability, such as coverture or infancy, etc., may prevent the operation of the statute, it must have existed at the time that the statute began to run. If it arises subsequently, it can have no effect.³ It will not stay the operation of the statute. And this rule governs whether the disability arises subsequently through the acts of the parties, as in the case of the subsequent marriage of a *feme sole*,⁴ or it occurs through the force of natural causes, such as subsequent insanity, or where the disseisee dies, and his title descends to an infant heir.⁵ It is usual, however, in the case of descent to infant heirs, to provide that the time of limitation shall be prolonged, so that the actions will not be barred until the lapse of a stated period after arrival at

¹ *Devyr v. Schaefer*, 55 N. Y. 451; *Jackson v. Schoonmaker*, 4 Johns. 390; *Miller v. Ewing*, 6 Cush. 34; *Raymond v. Holden*, 2 Cush. 269; *Gernet v. Lynn*, 31 Pa. St. 94; *Pinkney v. Burrage*, 30 N. J. L. 21; *Salmons v. Davis*, 29 Mo. 176.

² *Poignard v. Smith*, 8 Pick. 272; *Dadmun v. Lamson*, 9 Allen, 85.

³ *Mercer's Lessee v. Selden*, 1 How. 37; *Cotterell v. Dutton*, 4 Taunt. 820; *Edson v. Munsell*, 10 Allen, 557; *Gage v. Smith*, 27 Conn. 74; *Tracy v. Atherton*, 36 Vt. 503; *Reimer v. Stuber*, 20 Pa. St. 458; *Little v. Downing*, 37 N. H. 355; *Peters v. Jones*, 35 Iowa, 512; *McLane v. Moore*, 6 Jones L. 520; *Haynes v. Jones*, 2 Head, 372; *Clark's Ex'rs v. Trail*, 1 Mete. (Ky.) 40.

⁴ *Thorp v. Raymond*, 16 How. 247; *Carrier v. Gale*, 3 Allen, 328.

⁵ *Allis v. Moore*, 2 Allen, 306; *Fleming v. Griswold*, 3 Hill, 85; *Becker v. Van Valkenburgh*, 29 Barb. 324; *Lincoln v. Purcell*, 2 Head, 143.

majority. It is also the general rule, in the absence of an express statutory provision, that the Statute of Limitations will not run against the State or the United States. *Nullum tempus occurrit regi.*¹

§ 716. **How and when statute operates.**—The statute not only protects the title acquired by adverse possession, when it is assailed by plaintiff in an action of ejectment, but it may also be relied upon to vindicate his right to possession, where he has been ousted and he is forced to his action to recover possession. The statute not only bars the action, but it takes away the disseisor's former right to regain seisin by an entry. Any entry, therefore, which he may make after the lapse of the period of limitation, is a disseisin and does not reinvest him with the lawful seisin. The statute, therefore, may be set up by a plaintiff in ejectment in support of his title, even against one who has a clear paper title.² And it has also been held, where ejectment is brought by disseisee, and the disseisor with possession for the statutory period suffers judgment by default, he may set up the statute in a subsequent action of ejectment, in which he is plaintiff.³

§ 717. **Effect of the statute.**—All the earlier authorities held that the only effect of the Statute of Limitations was to bar the remedy, and that it did not affect the substantive right, whether the action was to recover real property or was only a personal *chose in action*.⁴ And this

¹ *Lindsey v. Miller*, 6 Pet. 660; *Burgess v. Gray*, 16 How. 48; *Oaksmith v. Johnston*, 92 U. S. 343; *People v. Van Rensselaer*, 8 Barb. 189; *Kingman v. Sparrow*, 12 Barb. 201; *Ward v. Bartholomew*, 6 Pick. 409; *Vickery v. Benson*, 26 Ga. 590; *Gardiner v. Miller*, 47 Cal. 570.

² *Ang. on Lim.*, sects. 380, 381; *Hughes v. Graves* 39 Vt. 365; *Phillips v. Kent*, 23 N. J. L. 155.

³ *Jackson v. Diffendorff*, 3 Johns. 269.

⁴ *Ang. on Lim.*, sects. 1, 7; 3 Washb. on Real Prop. 146; *Davenport v. Tyrrel*, 1 W. Bl. 975; *McElmoyne v. Cohen*, 13 Pet. 312; *Townsend v. Jemison*, 29 How. 407; *Bulger v. Roche*, 11 Pick. 36.

would appear to be the reasonable construction of the statutes. They in express terms bar the actions. But of late years some of the courts have gone further and held that the statute affected also the right or title of the disseisee.¹ Mr. Washburn says that "the operation of the statute takes away the title of the real owner, and transfers it, not in form, indeed, but in legal effect to the adverse occupant."² The statute may have the effect of destroying the title of the owner altogether and for all purposes, but it cannot be said to transfer it to the disseisor. His title is acquired by adverse possession, and it is only made perfect by rendering the rightful owner powerless to defeat it, either by entry or by ejectment. The only real value of this distinction lies in the settlement of a question arising under the subject of title by abandonment.³

¹ *School District v. Benson*, 31 Me. 384. See *Steel v. Johnson*, 4 Allen, 426; *Schall v. Williams Valley R. R.*, 35 Pa. St. 191; *Pederick v. Searle*, 5 Serg. & R. 240; *Moore v. Luce*, 29 Pa. St. 262; *Armstrong v. Risteau*, 5 Md. 256; *Ford v. Wilson*, 35 Miss. 504; *Grant v. Fowler*, 39 N. H. 103; *Blair v. Smith*, 16 Mo. 273. See 3 Washb. on Real Prop. 163, 164; Bliss on Code Pleading, sect. 356.

² 3 Washb. on Real Prop. 164.

³ See *post*, sect. 740.

SECTION V.

ESTOPPEL.

SECTION 724. Definition.

725. Estoppels *in pais*.

726. Is fraud necessary to estoppel *in pais*.

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728. Estoppel in deed — Continued.

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731. Estoppel binding upon whom.

§ 724. **Definition.** — A title by adverse possession may also be perfected by estoppel. Estoppel is an admission or representation which is held by law to be conclusive upon the party making it, because its disproof would result in injury to him who relied upon its truth. The subject has a general reference to all branches of the law. In its reference to titles to real property they may be divided into estoppels *in pais* and estoppels by deed.¹

§ 725. **Estoppels in pais.** — An estoppel *in pais* is a representation, either by act or by word, or even in some cases by silence, made by one party to another for the purpose of influencing the latter in reference to the title or boundary line of the property about to be purchased by the latter.² The representation, in order to constitute an estoppel,

¹ 3 Washb. on Real Prop. 70; 1 Prest. Abst. 421; Welland Canal v. Hathaway, 8 Wend. 480; Hanrahan v. O'Reilly, 102 Mass. 204; Sinclair v. Jackson, 8 Cow. 586; Douglass v. Scott, 5 Ohio, 199; Waters' Appeal, 35 Pa. St. 523; Co. Lit. 352 a.

² Ham v. Ham, 14 Me. 351; Attorney-General v. Merrimack Co., 14 Gray, 586; Hicks v. Cram, 17 Vt. 449; Barker v. Bell, 37 Ala. 359; Rutherford v. Taylor, 38 Mo. 315; Bangan v. Mann, 59 Ill. 492; McWilliams v. Morgan, 61 Ill. 89.

must refer to facts not equally within the knowledge and reach of both parties. If the purchaser, who relies upon the representation, had other convenient means of ascertaining the truth of the case, there will be no estoppel.¹ The party seeking to establish the estoppel must show that he actually relied upon the representation, and was thereby deceived.² It is further required that the representation must have been made with the intention to influence the conduct of the party misled, or it was so made that the latter might reasonably have been expected to rely upon it.³

§ 726. **Is fraud necessary to estoppel in pais?** — It has been a disputed question how far the element of fraud is necessary to constitute a false representation a ground for raising an estoppel. A large number of cases hold that, if there are present a false representation, an intention to influence, and a reliance upon that representation, an estoppel arises against the party making the false representation, notwithstanding he did so through an honest mistake as to the facts of the case.⁴ While it is maintained by other courts that the representation must have been made by one who either knew it to be false, or had no reasonable grounds

¹ *Odlin v. Gove*, 41 N. H. 477; *Hill v. Epley*, 31 Pa. St. 334; *McCune v. McMichael*, 29 Ga. 312; *Fletcher v. Holmes*, 25 Ind. 469; *Ormsby v. Ihmsen*, 34 Pa. St. 472; *Jewett v. Miller*, 10 N. Y. 406; *Gray v. Bartlett*, 29 Pick. 103; *Ferris v. Carver*, 10 Cal. 589.

² *Brown v. Bowen*, 30 N. Y. 541; *Malloney v. Heron*, 49 N. Y. 111; *Hanrahan v. O'Reilly*, 102 Mass. 201; *Anderson v. Coburn*, 27 Wis. 566; *Mahoney v. Van Winkle*, 21 Cal. 583; *Carpentier v. Thurston*, 24 Cal. 283.

³ *Turner v. Coffin*, 12 Allen, 401; *Andrews v. Lyon*, 11 Allen, 350; *Plumb v. Cattaraugus Ins. Co.*, 18 N. Y. 392; *Brown v. Bowen*, 30 N. Y. 541; *Russell v. Maloney*, 39 Vt. 584; *Calhoun v. Richardson*, 30 Conn. 210; *Patterson v. Lytle*, 11 Pa. St. 53; *Maple v. Kussart*, 53 Pa. St. 352; *Howard v. Hudson*, 2 Ell. & B. 1.

⁴ *Bigelow v. Foss*, 59 Me. 162; *Beaupland v. McKeen*, 28 Pa. St. 124; *Maple v. Kussart*, 53 Pa. St. 352; *Morris Canal v. Lewis*, 12 N. J. Eq. 332; *Jewett v. Miller*, 10 N. Y. 406; *Tilton v. Nelson*, 27 Barb. 595; *Andrews v. Lyon*, 11 Allen, 349; *Blackwood v. Jones*, 4 Jones Eq. 56; *McCune v. McMichael*, 29 Ga. 312; *Barnes v. McKay*, 7 Ind. 301; *Snodgrass v. Ricketts*, 13 Cal. 362.

for believing it to be true.¹ This dispute arises only where the representation concerns the title to the land generally. When the representation refers to the boundary line between two estates, the courts seemed to have generally agreed upon the following rule: Where the true line was a matter of uncertainty and dispute, and it could not, after a diligent search, be ascertained, if the parties agree upon a line, which shall constitute the boundary line, both will thereafter be estopped from denying that the line agreed upon was the true line, although the dispute arose from an honest mistake of one or both of the parties.² But if the representation was made under an honest mistake of the facts in a case, where there was no actual uncertainty as to the true line, the party making the representation would not thereafter be precluded from setting up the true line.³ These questions, however, involve the discussion of a great many principles of equity, and upon the application of which the courts are not altogether agreed. The foregoing enunciation of the leading principles is as much as can be attempted in an elementary treatise on real property. It is hardly necessary to state that, in order that an estoppel *in pais* may perfect a title by adverse possession, the possession must have been acquired under an honest claim of title. For an

¹ Davidson v. Young, 38 Ill. 152; Boggs v. Merced Co., 14 Cal. 367; Glidden v. Strupler, 52 Pa. St. 405; Copeland v. Copeland, 28 Me. 539; Whitaker v. Williams, 20 Conn. 104; Henshaw v. Bissell, 18 Wall. 271.

² Adams v. Rockwell, 16 Wend. 285; Dibble v. Rogers, 13 Wend. 536; Jackson v. Ogden, 7 Johns. 238; Orr v. Hadley, 36 N. H. 575; Terry v. Chandler, 16 N. Y. 355; Lindsay v. Springer, 4 Har. 547; Chew v. Morton, 10 Watts, 321; Knowles v. Toothaker, 58 Me. 174; Russell v. Maloney, 39 Vt. 580; Houston v. Sneed, 15 Texas, 307; Joyce v. Williams, 26 Mich. 332; Blair v. Smith, 16 Mo. 279; Sneed v. Osborn, 25 Cal. 624; Reed v. Farr, 35 N. Y. 117.

³ Proprietors, etc., v. Prescott, 7 Allen, 494; Thayer v. Bacon, 3 Allen, 163; Baldwin v. Brown, 16 N. Y. 359; Coon v. Smith, 29 N. Y. 392; Vosburgh v. Teator, 32 N. Y. 561; Russell v. Maloney, 39 Vt. 580. See Burdick v. Heinley, 23 Iowa, 515.

honest reliance upon the false representation in respect to the title is necessary to raise the estoppel. In perfecting titles by adverse possession, estoppels are set up by the defendant in defending the title so acquired and perfected. But, if necessary, it may also be set up by the plaintiff in exercising the rights of ownership incident to the title.

§ 727. **Estoppel by deed.** — In its relation to the title of lands an estoppel by deed arises, where there is in the deed an express or implied representation that the grantor at the time of his conveyance was possessed of the title which his deed purports to convey. If there is such a representation, and it is false, whether he is committing a fraud or is acting under an honest mistake, he is estopped from denying that he has a title; and consequently, if he should afterwards acquire the title, he could not by setting it up defeat his own grant.¹ But a grantor may disseise his grantee, and the title by adverse possession, so acquired, may ripen into a good title, which the grantor may assert. So also may he acquire a title subsequently in any other manner, and assert it against his grantee, provided it does not negative the validity of the title which he purported to convey.² The representation need not be express; it may be implied. The common-law conveyance by feoffment was itself an implied representation that the feoffor had an absolute title to the estate, which was sufficient to bind any subsequently acquired title in his hands.³ But in all other deeds, and particularly in deeds which take effect under the Statute of

¹ *Smith v. Moodus Water Co.*, 35 Conn. 400; *Clark v. Baker*, 14 Cal. 629; *Fairlittle v. Gilbert*, 2 T. R. 181; *Jackson v. Murray*, 12 Johns. 201; *Pike v. Galvin*, 29 Me. 183; *Doe v. Dowdall*, 3 Hust. 380; *Denn v. Cornell*, Johns. 174; *Reeder v. Craig*, 3 McCord, 411; *French v. Spencer*, 21 How. 228; *Washabaugh v. Entricken*, 34 Pa. St. 74.

² *Parker v. Proprietors, etc.*, 3 Metc. 102; *Stearns v. Hendersass*, 9 Cush. 502; *Tilton v. Emery*, 17 N. H. 538; *Smith v. Montes*, 11 Texas, 24; *Moore v. Littel*, 41 N. Y. 97; *Hope v. Stone*, 10 Minn. 152.

³ 3 Washb. on Real Prop. 94.

Uses, no estoppel can arise, unless the recitals or the covenants of the deed expressly or impliedly represent that the grantor had a good title to the land which he attempts to convey. No estoppel can arise merely from the execution and delivery of such a deed, and the payment of a valuable consideration.¹

§ 728. **Estoppel in deeds — Continued.** — It seems, however, in order that a recital may work an estoppel, it must refer specially to some particular fact. General recitals do not conclude the grantor from setting up an after-acquired title.² The covenants of warranty are held to raise an estoppel for the purpose of avoiding circuitry of action. An entry by the grantor under his after-acquired title would be a breach of the covenants, and instead of putting the grantee to his action on the covenants, the law estops the grantor from asserting the title in derogation of his own grant.³ But it is not necessary that the covenant be a general covenant of warranty. A special warranty would ordinarily be sufficient. It will operate as an estoppel to the extent of the liability thereby assumed by the

¹ 3 Washb. on Real Prop. 116; *White v. Patten*, 24 Pick. 324; *Wright v. Shaw*, 5 Cush. 56; *McCall v. Coover*, 4 Watts & S. 151; *Root v. Crock*, 7 Barr, 380; *Jackson v. Wright*, 14 Johns. 193; *Somes v. Skinner*, 3 Pick. 52; *Dart v. Dart*, 7 Conn. 250; *Brown v. Jackson*, 3 Wheat. 449; *Jackson v. Brinkerhoff*, 3 Johns. 101; *Kimball v. Blaisdell*, 5 N. H. 535; *Bruce v. Luke*, 9 Kan. 201; 12 Am. Rep. 491

² *Huntington v. Havens*, 5 Johns. Ch. 23; *Shelley v. Wright*, Willes, 9; Co. Lit. 352 b; *Morgan v. Larned*, 10 Metc. 53; *Carver v. Jackson*, 4 Pet. 85; *Stow v. Wyse*, 7 Conn. 214; *Scott v. Douglass*, 7 Ohio, 229; *Douglass v. Scott*, 5 Ohio, 194; *Hays v. Askew*, 5 Jones L. 637; *Harney v. Morton*, 36 Miss. 411; *Morton v. Saunders*, 7 J. J. Marsh. 14; *Hall v. Orvis*, 35 Iowa, 366.

³ *Somes v. Skinner*, 3 Pick. 52; *Oakes v. Marcey*, 10 Pick. 195; *Blanchard v. Ellis*, 1 Gray, 195; *Dart v. Dart*, 7 Conn. 250; *Cole v. Raymond*, 9 Gray, 217; *Jackson v. Bradford*, 4 Wend. 619; *Irvine v. Irvine*, 9 Wall. 625; *Mickles v. Townsend*, 18 N. Y. 577; *Jackson v. Hubble*, 1 Cow. 613; *Jackson v. Waldron*, 13 Wend. 189; *Bogy v. Shoab*, 13 Mo. 378.

grantor.¹ In order that a covenant may work an estoppel it must be contained in a deed which is good and valid in law as well as in equity. A defective deed cannot create an estoppel by covenant.² So will no estoppel arise from a deed with covenant of warranty, where the deed passes an interest, upon which the warranty can operate, although the interest so passing is not commensurate with the intention of the parties.³ And if the deed conveys "all the right, title and interest" of the grantor, instead of an absolute estate, the grantor will not be estopped from setting up an after-acquired title, since he did not undertake to convey any greater interest or better title than he then had.⁴ And where the deed is executed by two or more owners of an estate in common, the estoppel, whether it is based upon a recital or a covenant of warranty, or both, only operates upon the share of each grantor, and does not prevent one from setting up a title to the shares of the other, which he acquires subsequently.⁵

§ 729. **Effect of estoppel upon the title.** — Where the estoppel arises *in pais* there seems to be no doubt that it has only the effect of locking up the adverse title in the person against whom the estoppel operates, instead of creating a title in, or transferring the true title to, the person for whose benefit it is brought into operation. It only precludes the party from setting up his true title against him,

¹ Trull v. Eastman, 3 Metc. 121; Blake v. Tucker, 12 Vt. 39; Kimball v. Blaisdell, 5 N. H. 535; Brundred v. Walker, 12 N. J. Eq. 140.

² Blanchard v. Brooks, 12 Pick. 47; Patterson v. Pease, 5 Ohio, 190; Kercheval v. Triplett, 1 A. K. Marsh. 493; Dougal v. Fryer, 3 Mo. 29; Raymond v. Holden, 2 Cush. 264.

³ Jackson v. Hoffman, 9 Cow. 271; Lewis v. Baird, 3 McLean, 56; 2 Prest. Abst. 216; 4 Kent's Com. 98.

⁴ Mills v. Ewing, 6 Cush. 34; Doane v. Wilcutt, 5 Gray, 328; Raymond v. Raymond, 10 Cush. 134; Jackson v. Peck, 4 Wend. 300; Pike v. Galvin, 29 Me. 183; Harrison v. Gray, 49 Me. 538; Wynn v. Harman, 5 Gratt, 157; Krusman v. Loomis, 11 Ohio, 475; White v. Brocaw, 14 Ohio St. 344.

⁵ Trull v. Eastman, 3 Metc. 121; Wright v. Shaw, 5 Cush. 56.

who has been influenced by false representation. If one who has been deceived has actually received no title in any other way, the doctrine of estoppel will only help him in an action brought to recover the title to which he is entitled. If he has a title by adverse possession under a claim of title, the estoppel will perfect it by preventing his ouster under the paramount title by those who are affected by the estoppel. But a difficult question arises in this connection, where it is an estoppel by deed. Two different theories prevail, and are supported by eminent authority. According to one theory the estoppel by deed simply precludes the grantor from setting up an after-acquired title in derogation of his own grant. The opposing theory is to the effect that the estoppel actually passes the after-acquired title to the grantee immediately upon its acquisition by the grantor. To use the expression commonly found in these authorities, it "enures" to the grantee. This latter theory is directly opposed to the general doctrine of estoppel, and is believed to be unfounded.

§ 730. **Effect of estoppel — Continued.** — A large array of authorities is cited by Mr. Rawle on Covenants of Title, and Mr. Washburn,¹ but as Mr. Bigelow very correctly states, in his article,² and again in his work on Estoppel,³ these authorities refer to the subject only in general

¹ Rawle, Cov. of Tit. (4th ed.) 404; 3 Washb. on Real Prop. 109. The following are the leading cases cited by Mr. Washburn: *Jackson v. Stevens*, 13 Johns 316; *Brown v. McCormick*, 6 Watts, 60; *Jackson v. Matsdorf*, 11 Johns. 91; *Somes v. Skinner*, 3 Pick. 52; *Terrett v. Taylor*, 9 Cranch, 48; *Wark v. Willard*, 13 N. H. 389; *Comstock v. Smith*, 13 Pick. 116; *White v. Patten*, 24 Pick. 324; *Allen v. Parish*, 3 Ohio, 107; *Bond v. Swearingen*, 1 Ohio, 190; *Lawry v. Williams*, 13 Me. 281; *Jackson v. Wright*, 14 Johns. 193; *Van Rensselaer v. Kearney*, 11 How. 322; *Goodson v. Beacham*, 24 Ga. 150; *Kimball v. Schoff*, 40 N. H. 190; *Burton v. Reeds*, 20 Ind. 93; *McCusker v. McEvey*, 9 R. I. 528; *Plympton v. Converse*, 42 Vt. 712; *Doe v. Dowdall*, 3 Houst. 369.

² 9 Am. Law Rev. 252.

³ Big. on Estop. 285-339.

terms, and cannot be treated as final and conclusive. In fact, in some of the cases, the position is assumed by the reporter in the *syllabus*, without having anything in the decision of the court, or the facts of the case, to warrant it.¹ According to Mr. Bigelow, the error has occurred through a failure to distinguish between the effect of the common law conveyances of feoffment, fine, recovery and lease, and that of the deeds which take effect under the Statute of Uses. He admits that by these common-law conveyances the after acquired interest passed by estoppel to the grantee, while he holds that a different conclusion must be reached in respect to deeds of bargain and sale, covenants to stand seised, and lease and release. In the leading case of *Somes v. Skinner*,² all the authorities relied upon concerned estoppels arising in these common law conveyances. But it seems to the present writer that the entire doctrine is fallacious, whether it refers to common-law conveyances, except a lease for a term of years, or to deeds under the Statutes of Uses, and it arises from the false idea of the courts that the doctrine of enurement was necessary, in order to give the grantee sufficient title to defend against trespassers.³ At common law no conveyance could be made by one of lands which were in the adverse possession of another.⁴ Where, therefore, there was a conveyance made of the lands — particularly if it was a common-law conveyance — the grantee or feoffee acquired at least a title by adverse possession, if his grantor was not lawfully seised. This title by adverse pos-

¹ See particularly, *Jackson v. Stevens*, 13 Johns. 316; *Jackson v. Mattdorf*, 11 Johns. 91; *Terrett v. Taylor*, 9 Cranch, 43.

² 3 Pick. 52..

³ *Blanchard v. Ellis*, 1 Gray, 195; *Bean v. Welsh*, 17 Ala. 770. A common law lease for a term of years is an executory contract, until the lessee has entered into possession. See *ante*, sect. 174. The lessee may therefore sue for possession at any time during his term, and may take advantage of any after-acquired title of his lessor. But the grant of a freehold operates *eo instanti*, and conveys the title upon the delivery of the deed, or not at all.

⁴ See *post*, sect. 795.

session was good against all the world except the true owner.¹ And if his grantor acquired the paramount title he was estopped from enforcing it against his grantee. The distinction between the two theories only acquired importance when the common-law rule, requiring the grantor to be seised, was abolished, and the grantor was permitted to make a legal conveyance while he was disseised. The question then for the first time arose, whether the title, subsequently acquired by one who at the time of his grant had neither title nor possession, so far passed by estoppel to the grantee as to permit him to maintain an action of ejectment against one, who holds in adverse possession to both him and his grantee. That a man acquires nothing by a deed from one, who has neither title nor possession, needs no authority.² The after-acquired title must enure or pass to the grantee, instead of being shut up in the hands of the grantor, in order that the grantee may maintain ejectment against a disseisor.³ The better opinion is that no title passes by estoppel to the grantee. If he has acquired none by force of his grant, *i.e.*, if he has not acquired a title by adverse possession he does not gain one by estoppel.⁴ In some of the States, to supply this deficiency, statutes have been enacted, which cause after acquired titles to pass *instantly* from the grantor to the grantee.⁵ In the absence of the

¹ See *ante*, sects. 692, 693.

² Tyl. on Adv. Pos. 542.

³ See *Jackson v. Bradford*, 4 Wend. 619; 3 Prest. Abst. 25; *Wivel's Case*, Hob. 45; *Wright v. Wright*, 1 Ves. sr. 391; *Somes v. Skinner*, 3 Pick. 52, 80; *Bivins v. Vinzant*, 15 Ga. 521; *Way v. Arnold*, 18 Ga. 350; *Jacocks v. Gilliam*, 3 Murph. 47; *s. c.*, 4 Hawks, 310, to the effect that such a grantee could not maintain an action of ejectment in his own name against the disseisor.

⁴ *Gibson v. Chouteau*, 39 Mo. 566; *Valle v. Clemens*, 18 Mo. 486; *Bogy v. Shoab*, 13 Mo. 379; *Bush v. Marshall*, 6 How. 288; *Van Rensselaer v. Kearney*, 11 How. 322; *Cocke v. Brogan*, 5 Ack. 699; *Frink v. Darst*, 14 Ill. 308; *Clark v. Baker*, 14 Cal. 612; *Buckingham v. Hann*, 2 Ohio St. 551; *Bivins v. Vinzant*, 15 Ga. 521; *Jackson v. Bradford*, 4 Wend. 619; *Wright v. Wright*, 1 Ves. sr. 391. See *Reeder v. Craig*, 3 McCord, 411.

⁵ *Bogy v. Shoab*, 13 Mo. 379; Mo. Rev. Stat. (1879), sect. 3949; *Frink v. Darst*, 14 Ill. 308; *Cocke v. Brogan*, 5 Ark. 699; *Clark v. Baker*, 14 Cal. 612.

statute the title remains in the grantor, but he is precluded from setting it up. Neither is the grantee obliged to take advantage of the title subsequently acquired. He may bring his actions for the breach of the covenants if he has been evicted.¹ It would seem that if the title actually enured to the grantee, his dispossession by his grantor, under the claim of a paramount title, could not be treated as a breach of the covenant of warranty. It would be a simple act of trespass. And in cases where by estoppel one acquires a right to the title of lands subsequently acquired, a court of equity will always grant a decree for further assurance, so as to protect the grantee's title against the acquisition of the paramount title by an innocent purchaser without notice of the estoppel.

§ 731. **Estoppel binding upon whom.** — An estoppel will not only bind the party who makes the false representation, but also all those who are in privity with him, whether the privity is of estate, of contract, or by blood. A stranger can neither take advantage of an estoppel, nor be bound by it.² Nor can any one enforce an estoppel, except the person to whom the representation was made, or who was intended to be influenced, and those who stand in privity with him, and claim under him. But where the privies of the grantor, who is estopped, are subsequent purchasers for value, they are only estopped where they have a notice of the estoppel, whether that estoppel arises *in pais* or by deed.³ If the subsequent purchaser of an after-acquired title has received no notice of the prior deed, the estate in his hands is freed from

Blanchard v. Ellis, 1 Gray, 195; Tucker v. Clarke, 2 Sandf. Ch. 96; Bingham v. Weiderwax, 1 N. Y. 509; Burton v. Reed, 20 Ind. 87; Woods v. North, 6 Humph. 309; Noonan v. Isley, 21 Wis. 139. *Contra*, King v. Gelson, 32 Ill. 348; Reese v. Smith, 12 Mo. 344.

² Wivel's Case, Hob. 45; Wright v. Wright, 1 Ves. sr. 391; *Somes v. Skinner*, 3 Pick. 52; *Jacocks v. Gilliam*, 3 Murph. 47; *s. c.*, 4 Hawks, 310; *Doe v. Dowdall*, 3 Houst. 369; *Bivins v. Vinzant*, 15 Ga. 521; *Way v. Arnold*, 18 Ga. 350; *Douglass v. Scott*, 5 Ohio, 197; *Maple v. Kussart*, 53 Pa. St. 351.

³ *Carpenter v. Buller*, 8 Mees. & W. 212; 3 Washb. on Real Prop. 91.

the estoppel.¹ But it is a doubtful question whether the registration of the prior deed, before the title had been acquired by the grantor and recorded, would properly be considered constructive notice of the estoppel. It is certainly in violation of the spirit of the registration laws which only require the investigator to search the records for any incumbrance or conveyance which occurs between the time when the grantor acquired the title, and the time when he offers the title for conveyance.² But in order that one may be bound by an estoppel, he must have the capacity to make a valid deed. Infants and married women cannot be bound by estoppel.³

¹ *Duchess of Kingston's Case*, 2 Smith's Ld. Cas. 720; *Shaw v. Beebe*, 35 Vt. 204; *Jarvis v. Aikens*, 25 Vt. 635; *Great Falls Co. v. Worcester*, 15 N. H. 452; *Thistie v. Buford*, 50 Mo. 278; *Bivins v. Vinzant*, 15 Ga. 521; *Rawle Cov. Tit.* 427.

² *Calder v. Chapman*, 2 P. F. Smith, 359; *McCusker v. McEvey*, 10 R. I. 606; dissenting opinion of Judge Potter; *Great Falls Co. v. Worcester*, 15 N. H. 452; *Bivins v. Vinzant*, 15 Ga. 521; *Gouchenour v. Mowry*, 33 Ill. 331.

³ *Raymond v. Holden*, 2 Cush. 264; *Concord Bk. v. Bellis*, 10 Cush. 276; *Todd v. Kerr*, 42 Barb. 317; *Lowell v. Daniels*, 2 Gray, 161; *Brown v. McCune*, 5 Sandf. 224; *Morrison v. Wilson*, 13 Cal. 494; *Lackman v. Wood*, 25 Cal. 153; *Williams v. Baker*, 71 Pa. St. 482.

SECTION VI.

ABANDONMENT.

SECTION 739. Effect of abandonment generally.

740. Abandonment of title by adverse possession.

741. Surrender of deed.

§ 739. **Effect of abandonment generally.** — It has been supposed, that a title to real property may be lost by abandonment by the owner, and such would seem to have been the opinion of the United States Circuit Court of Ohio.¹ Easements and other incorporeal hereditaments may be lost by abandonment, as has been explained.² So also may all equitable and executory rights to or in the title.³ But wherever abandonment can take effect, it simply destroys the title, and does not vest it in another. A bargain to give up an equitable claim may work an abandonment, but the bargainee acquires no title by the bargain. But no legal title of a corporeal hereditament may be lost or destroyed by any act of abandonment, with a possible exception to be mentioned in the next section. A legal title, properly vested, can only be divested by abandonment, when the circumstances of the case are sufficient to raise an estoppel, or where the possession is acquired by one in consequence of the abandonment, and held by him under claim of title for the period of limitation. The title, although not lost by abandonment, would be barred by estoppel or

¹ Holmes v. Railroad, 8 Am. Law Reg. 716.

² See *ante*, sect. 605.

³ Picket v. Dowdall, 2 Wash. 197; Dikes v. Miller, 24 Texas, 424; Barker v. Salmon, 12 Metc. 32; Sumner v. Stevens, 6 Metc. 337; Booker v. Stivender, 13 Rich. Eq. 85; Kirk v. King, 3 Pa. St. 441.

by the Statute of Limitations.¹ The voluntary abandonment would not prevent the possession of another from becoming adverse to the real owner, though the abandonment was expressly made for his benefit and to him. But where the abandonment is not accompanied by the circumstances of estoppel or limitation, no matter how formal the abandonment was, if it fell short of a legal deed of conveyance, it has no effect whatsoever upon the legal title. The owner may afterwards re-enter and eject any one who may have entered into possession in reliance upon the abandonment.

§ 740. **Abandonment of title by adverse possession.** — There can be no doubt that, as long as the title by adverse possession is not made absolute by the operation of the Statute of Limitations, it may be lost or destroyed by abandonment. It is an invariable requirement that the possession must be continued and uninterrupted, in order that the title of the real owner may be barred by the statute.² But where the statutory period has elapsed, and the title of the true owner is barred, it becomes a question of considerable doubt, whether a subsequent abandonment would destroy the title by adverse possession which has then become perfected by the operation of the statute. The Supreme Courts of Georgia and Massachusetts have held that such an abandonment would be taken as conclusive proof of the fact that the possession had not been adverse, and would remove the bar of the statute.³ A contrary opinion has been reached by the Supreme Court of Maine.⁴ The solution of the ques-

¹ *Jackson v. Bowen*, 1 Caines, 358; *Adams v. Rockwell*, 16 Wend. 307; *Tolman v. Sparhawk*, 5 Metc. 476; *Barker v. Salmon*, 2 Metc. 32; *Sumner v. Stevens*, 6 Metc. 327; *Gregg v. Blackmore*, 10 Watts, 192; *Allen v. Parish*, 3 Ohio, 107.

² See *ante*, sect. 714.

³ *Vickery v. Benson*, 26 Ga. 589; *Church v. Burghart*, 8 Pick. 327.

⁴ *School District v. Benson*, 31 Me. 381.

tion depends upon the proper theory in regard to the effect of the Statute of Limitations. If the statute simply takes away the rightful owner's remedies for the recovery of seisin and possession, and leaves the barren right or title still subsisting in him, then if he recovers the seisin by the consent of the disseisor, having then both the seisin and the lawful title, it would seem that the title by adverse possession and limitation would be destroyed by the abandonment. But if the statute goes farther, and either transfers the lawful title of the real owner or destroys it completely, then the abandonment would have no more effect in this case than it would upon any other title. The possession acquired by the rightful owner in such a case would only give him a title by adverse possession, which can only be made absolute by estoppel or by limitation.

§ 741. **Surrender of deed.** — It has, however, been held in a number of cases that if a deed is delivered up by the grantee, and destroyed, the title reverts in the grantor, if the deed has not been recorded. And the ground upon which the courts rest this decision is that, having voluntarily destroyed this primary evidence of title, the grantee will not be permitted to introduce parol evidence to establish the contents of the deed.¹ But the mere cancellation and return of the deed will not be sufficient to revert the title in the grantor.² An effective abandonment would only result

¹ *Commonwealth v. Dudley*, 10 Mass. 403; *Holbrook v. Tirrell*, 9 Pick. 105; *Lawrence v. Stratton*, 6 Cush. 163; *Howe v. Wilder*, 11 Gray, 267; *Patterson v. Yeaton*, 47 Me. 314; *Parker v. Kane*, 22 How. 1; *Dodge v. Dodge*, 33 N. H. 487; *Sawyer v. Peters*, 50 N. H. 143; *Howard v. Huffman*, 3 Head, 564; *Blake v. Fash*, 44 Ill. 305; *Speer v. Speer*, 7 Ind. 178; *Thompson v. Thompson*, 9 Ind. 328; *Blaney v. Hanks*, 14 Iowa, 400; *Baker v. Kane*, 4 Wis. 12.

² *Lawrence v. Stratton*, 6 Cush. 163; *Conway v. Deerfield*, 11 Mass. 332; *Wilson v. Hill*, 13 N. J. Eq. 143; *Gilbert v. Bulkley*, 5 Conn. 262; *Holmes v. Trout*, 7 Pet. 171; *Hall v. McDuff*, 24 Me. 312; *Fonda v. Sage*, 46 Barb. 122; *Fawcett v. Kinney*, 33 Ala. 264; *Howard v. Huffman*, 3 Head, 562; *Kearsing v. Kilian*, 18 Cal. 491.

therefrom where the circumstances give rise to an estoppel, as where an innocent purchaser is induced to accept a deed from the grantor,¹ or where all the muniments of title have been voluntarily destroyed and the grantee has to resort to parol evidence to prove his title. A recorded deed cannot, therefore, be surrendered in this way. A surrender can only be made to the grantor, and nothing short of cancellation or destruction of the deed would have the effect of passing the title back to him.²

¹ *Commonwealth v. Dudley*, 10 Mass. 403; *Holbrook v. Tirrell*, 9 Pick. 105; *Trull v. Skinner*, 17 Pick. 213; *Patterson v. Yeaton*, 47 Me. 314.

² *Howe v. Wilder*, 11 Gray, 267; *Bank v. Eastman*, 44 N. H. 778; *Blaney v. Hanks*, 14 Iowa, 400; *Parker v. Kane*, 4 Wis. 12; 22 How. 1.

CHAPTER XXI.

TITLE BY GRANT.

- SECTION I. *Title by public grant.*
 II. *Title by involuntary alienation.*
 III. *Title by private grant.*

SECTION I.

TITLE BY PUBLIC GRANT.

SECTION 744. Public lands.

745. Forms of public grant.

746. The relative value of the patent and certificate of entry.

747. Pre-emption.

§ 744. **Public lands.** — As has been explained in a preceding section, all lands not held as the private property of individuals are vested in the State or United States. In the original thirteen States all such lands belong to the State, while in all the others which were subsequently admitted into the Union, except Texas, the public lands, except those given by compromise to certain States, are the property of the United States.¹ These lands of the general government have been by official survey divided into townships and sections, and the latter again sub-divided into fractions of a section, halves, quarters and eighths. And in making a grant or conveyance of these lands, reference is made to the township, section, and fraction of a section, as a sufficient description of the tract conveyed.² The conveyance, by

¹ 3 Washb. on Real Prop. 182-184; *Terrett v. Taylor*, 9 Cranch, 50; *Worcester v. Georgia*, 6 Pet. 543; *Johnson v. McIntosh*, 8 Wheat. 543.

² 3 Washb. on Real Prop. 185; *Walk. Am. Law*, 42, 43.

which the title to public lands is transferred by the government to private individuals, is called a *public grant*. Although particular reference is made in this connection to the public lands held by the general government, the general principles here explained are equally applicable to lands belonging to the State government. In respect to the public lands of the United States, it must be understood that although the law of the State in which the land lies governs the rights of property in it, when it is the property of a private individual,¹ until a grant of such land has been made by the government, and even in construction of the validity of the grant, the law of the United States is paramount. Until conveyance by the government the lands are not subjected to State control.² Another rule of construction may be mentioned here which has a general application to the subject under consideration. It is, that in question of property rights arising between the State and individual the construction is always most favorable to the State, whereas a grant from one individual to another is construed most favorably to the grantee.³ But it seems that where the grant by the State is for a valuable consideration this rule of construction does not apply, unless the ambiguity arising on the face of the grant is absolutely inexplicable.⁴ Never-

¹ *United States v. Crosby*, 7 Cranch, 115; *Kerr v. Moon*, 9 Wheat. 565; *Darby v. Mayer*, 10 Wheat. 465; *Cutler v. Davenport*, 1 Pick. 81; *Calloway v. Doe*, 1 Blackf. 372; *Nims v. Palmer*, 6 Cal. 8.

² *Irvine v. Marshall*, 20 How. 558; *Bagnell v. Broderick*, 13 Pet. 436; *Wilcox v. Jackson*, 13 Pet. 516; *Pratt v. Brown*, 3 Wis. 603; *Cannon v. White*, 16 La. An. 89. In California it has been held that the United States hold the public lands in that State on the same terms and with the same incidents of ownership as any other private proprietor, except taxation; and that they can only exercise their rights in the mines in subordination to the general laws on that subject of California. *Boggs v. Merced Co.*, 14 Cal. 375.

³ *Dubuque R. R. v. Litchfield*, 23 How. 88; *Mayor, etc., v. Ohio & P. R. R.*, 26 Pa. St. 355; *Townsend v. Brown*, 24 N. J. L. 80; *Green's Estate*, 4 Md. Cl. 349; *Hagan v. Campbell*, 8 Port. 9.

⁴ *Martin v. Waddell*, 16 Pet. 411; *Charles River Bridge v. Warren Bridge*, 11 Pet. 589; *Commonwealth v. Roxbury*, 3 Gray, 492; *Hyman v. Read*, 14 Cal. 444.

theless, if the State grants an estate upon condition, the breach of the condition will at once divest the title without the necessity of an entry.¹ The State is not subject to estoppel under a covenant of warranty; it is estopped only by the description contained in a valid grant.²

§ 745. **Forms of public grant.** — The grant is not required to assume any particular form. It may be made by special act of Congress, or by deed made in pursuance of some general act. But the public lands of the United States can only be disposed of by authority of Congress, expressed in a special or general act.³ Congress has passed general laws providing for the sale of public lands. These laws provide for the establishment of land offices in the Western and other States where the general government still owns large tracts of land, and the would-be purchaser is required to make his negotiations with the registers and receivers of these offices. The purchaser enters upon the records of the office a full and complete description of the land he desires to purchase, and having paid the purchase-money, he receives from the register a certificate of entry, as it is called, which entitles him to a patent, which is the formal deed of conveyance required by the general laws for the transfer of the legal title. The patent is signed by the President, or by one authorized to affix his signature, and sealed with the seal of the United States.⁴

¹ *Kennedy v. McCartney*, 4 Port. 141.

² *Mayor, etc., v. Ohio & P. R. R.*, 26 Pa. St. 355; *Elmendorf v. Carmichael*, 3 Litt. 472; *State v. Crutchfield*, 3 Head, 113.

³ *Lorrimier v. Lewis*, 1 Morris (Iowa), 253; *Pratt v. Brown*, 3 Wis. 603; *Challefoux v. Ducharme*, 8 Wis. 306; *Foley v. Harrison*, 5 La. An. 75; *Freedman v. Goodwin*, 1 McAll. Ch. 142; *Terrett v. Taylor*, 9 Cranch, 50; *Chouteau v. Eckhart*, 2 How. 372; *Wilkinson v. Leland*, 2 Pet. 662; *Strother v. Lucas*, 12 Pet. 454.

⁴ 3 Washb. on Real Prop. 185; *People v. Livingston*, 8 Barb. 253; *Doe v. McIlvaine*, 14 Ga. 252; *Hulick v. Scovil*, 9 Ill. 174. Once the patent has been legally executed and delivered it cannot be revoked. *Fletcher v. Peck*, 6 Cranch, 87; *Grignon v. Astor*, 2 How. 319; *Sargent v. Simpson*, 8 Me. 148; *Doe v. Beardsley*, 2 McLean, 412; *Stockton v. Williams*, 1 Doug. (Mich.) 546.

§ 746. **The relative value of the patent and certificate of entry.** — According to some of the cases arising in the State courts, the certificate of entry vests an inchoate or imperfect *legal* title in the vendee, which will enable him to maintain ejectment or trespass against a trespasser, and that the patent is merely the perfection of the imperfect legal title already acquired, by providing the strongest kind of evidence of the previous grant.¹ But the United States courts maintain that the purchaser only acquires an equitable title, which is not sufficient to support legal actions in defence of the land, but which is sufficient to vest in him an absolute right to the patent. Once a certificate of entry has been lawfully issued, the same land cannot be subsequently sold.² This distinction between a patent and a certificate of entry is so well and generally recognized that where a patent has been issued to one person, and another is entitled to the patent by virtue of the prior entry and certificate, the patentee, nevertheless, holds the absolute legal title until the patent has been avoided by a direct proceeding brought for that purpose by the government, or by the rightful owner in its name. The patent in collateral proceedings is conclusive evidence of title, and cannot then be questioned, unless it be void upon its face.³ But the

¹ *Sims v. Irvine*, 3 Dall. 456; *Morton v. Blankenship*, 5 Mo. 346; *Carman v. Johnson*, 29 Mo. 94; *Jackson v. Wilcox*, 2 Ill. 344; *Forbes v. Hall*, 34 Ill. 167; *McDowell v. Morgan*, 28 Ill. 532; *Cavender v. Smith*, 5 Iowa, 189; *s. c.*, 8 Iowa, 349; *Bullock v. Wilson*, 2 Port. 436; *Goodlet v. Smithson*, 5 Port. 243; *Jennings v. Whitaker*, 4 B. Mon. 50; *Waterman v. Smith*, 13 Cal. 419. See also *Copley v. Riddle*, 2 Wash. C. Ct. 354; *Sweatt v. Corcoran*, 37 Miss. 516; *Dickinson v. Brown*, 9 Smed. & M. 130.

² *Fenn v. Holme*, 21 How. 481; *Bagnell v. Broderick*, 13 Pet. 436; *Lindsey v. Miller*, 6 Pet. 666; *Fletcher v. Peck*, 6 Cranch, 87; *Mayor v. DeArmas*, 9 Pet. 223; *Stockton v. Williams*, 1 Dougl. (Mich.) 560; *Waller v. Von Phul*, 14 Mo. 84; *Carman v. Johnson*, 20 Mo. 108; *Nelson v. Sims*, 23 Miss. 383; *Moyer v. McCullough*, 1 Ind. 339; *Astrom v. Hammond*, 3 McLean, 107; *Mix v. Smith*, 7 Pa. St. 75; *West v. Hughes*, 1 Harr. & J. 6; *Cavender v. Smith*, 5 Iowa, 189.

³ *Bagnell v. Broderick*, 13 Pet. 436; *Steiner v. Cox*, 4 Pa. St. 28; *Griffith v. Deerfelt*, 17 Mo. 31; *Hill v. Miller*, 36 Mo. 182; *Gallipot v. Manlove*, 2 Ill.

courts all agree that the certificate of entry vests in the purchaser sufficient title, whether legal or equitable, so that it can be aliened or devised; and upon the death of the purchaser before the issue of the patent it descends to his heirs; and the purchaser's alienee, devisee and heirs, respectively, are entitled to the patent, in the place of the person to whom the certificate has been given.¹ But where the purchaser has died the patent must be made out in the name of the heirs. A patent issued in the name of a purchaser, in pursuance of a certificate of entry, but after the death of the purchaser, is void, and the heirs cannot take advantage of it.² And where a purchaser has assigned his certificate, and takes out a patent in his own name, he will hold the legal title thus acquired in trust for his assignee, and he can be required to make the proper conveyances.³ In all cases, in order to entitle one to a patent, the land must be clearly described in the certificate of entry, so as to enable an easy identification of the land. An inaccurate or obscure description would bar the right to a patent.⁴

156; *Goodlet v. Smithson*, 5 Port. 243; *Stringer v. Young*, 3 Pet. 320; *Boardman v. Reed*, 6 Pet. 328; *Curle v. Barrell*, 2 Sneed, 68; *Willot v. Sandford*, 19 How. 79; *Moore v. Wilkinson*, 13 Cal. 478. See *Brush v. Ware*, 15 Pet. 98; *Sweatt v. Corcoran*, 37 Miss. 516; *Harris v. McKissack*, 34 Miss. 464; *Dickinson v. Brown*, 9 Smed. & M. 130; *Leblanc v. Ludrique*, 14 La. An. 772; *Maxey v. O'Connor*, 23 Texas, 238.

¹ *Galt v. Galloway*, 4 Pet. 332; *Brush v. Ware*, 15 Pet. 98; *Reeder v. Barr*, 4 Ohio, 458; *Adams v. Logan*, 6 B. Mon. 175; *Shanks v. Lucas*, 4 Blackf. 476; *Goodlet v. Smithson*, 5 Port. 243; *Wright v. Swan*, 6 Port. 84; *Cavender v. Smith*, 8 Iowa, 360; *Forsythe v. Ballance*, 6 McLean, 562.

² *Galloway v. Finley*, 12 Pet. 264; *Blankenpickler v. Anderson's Heirs*, 16 Gratt. 59; *Price v. Johnston*, 1 Ohio St. 390; *Wood v. Ferguson*, 7 Ohio St. 288; *Phillips v. Sherman*, 36 Ala. 189. *Contra*, *Schedda v. Sawyer*, 4 McLean, 181. See *Thomas v. Wyatt*, 25 Mo. 24; *Thomas v. Boerner*, 25 Mo. 27. But by the act of Congress of 1836, if the patent is issued to a deceased person, in ignorance of his death, it will enure to the benefit of his heirs. *Phillips v. Sherman*, 36 Ala. 189; *Stubblefield v. Boggs*, 2 Ohio St. 216.

³ *Trimble v. Boothby*, 14 Ohio, 109; *Hayward v. Ormsbee*, 11 Wis. 3; *Moore v. Maxwell*, 18 Ark. 469; *Hennen v. Wood*, 16 La. An. 263.

⁴ *Lafayette v. Blanc*, 11 How. 104; *Ledoux v. Black*, 18 How. 473.

§ 747. **Pre-emption.**—In order to encourage immigration and the actual settlement upon public lands, the acts of Congress from an early day have provided that where one actually settles upon public lands, and makes entry upon the records of the land office of his claim, with accurate description of the land upon which he has settled, he acquires thereby the so-called “pre-emption” right, which entitles him to a patent to the land so occupied at the minimum price fixed by law for the sale of public lands, and gives him a superior claim to a patent over all other persons who may acquire interests in the same land.¹ One cannot claim the pre-emption right to more than one quarter section, or 160 acres.² But no one can claim pre-emption to lands which have been set apart as a reservation, or to lands which are situated within the limits of a town or city, or those on which persons have actually settled for the purpose of carrying on any business or trade, other than agriculture, or on which there are known salt or other mines.³ And in order to entitle one to pre-emption, he must make oath that he does not own 320 acres of land in any State or Territory, and that he has not abandoned a residence on his own land within the same State or Territory, in order to reside upon the public lands.⁴ By the entry in the land office, and actual settlement upon the land, only an inchoate title is acquired. To perfect it, and obtain an absolute legal title, payment of the purchase-money must be made within thirty months after the entry.⁵ This inchoate title descends to the heirs of the pre-emptor.⁶ But it cannot be

¹ 3 Washb. on Real Prop. 200; U. S. Rev. Stat., sects. 2256, 2257; *United States v. Fitzgerald*, 15 Pet. 407; *Craig v. Tappin*, 2 Sandf. Ch. 78; *McAfee v. Keirn*, 7 Smed. & M. 780; *Pettigrew v. Shirley*, 9 Mo. 683; *Brown v. Throckmorton*, 11 Ill. 529.

² U. S. Rev. Stat., sect. 2259.

³ U. S. Rev. Stat., sect. 2258.

⁴ U. S. Rev. Stat., sects. 2260, 2262.

⁵ U. S. Rev. Stat., sect. 2267.

⁶ *Hunt v. Wickliffe*, 2 Pet. 201; *Johnson v. Collins*, 12 Ala. 322.

assigned so as to give the assignee a right to the pre-emption, as against the government, or one claiming under a patent.¹ But where the pre-emptor has undertaken to convey before he has acquired the legal title, he will take the patent as trustee for the assignee, and the latter will acquire the benefit of it by instituting the proper proceedings.² In like manner, creditors cannot levy upon the pre-emption right.³ Very often conflicting claims arise under the exercise of the pre-emption right, growing out of deficient locations and entries; and it is provided by the acts of Congress that these disputes shall be settled by the land commissioners and registers. In the settlement of these disputes, the commissioners act in a judicial capacity, and their decisions are subject to appeal to the higher authorities, but otherwise they are final and conclusive, unless tainted with fraud.⁴

¹ U. S. Rev. Stat., sect. 2263; *Craig v. Tappin*, 2 Sandf. Ch. 78; *Lytle v. Arkansas*, 9 How. 333; *Cunningham v. Ashley's Heirs*, 14 How. 377; *Barnard's Heirs v. Ashley's Heirs*, 18 How. 44; *Myers v. Croft*, 13 Wall. 291; *Brown v. Throckmorton*, 11 Ill. 529; *Frisbie v. Whitney*, 9 Wall. 187; *Hutchings v. Low*, 15 Wall. 77; *Phelps v. Kellogg*, 15 Ill. 131.

² *Camp v. Smith*, 2 Minn. 155; *Delaunay v. Burnett*, 9 Ill. 454.

³ *Rodgers v. Rawlins*, 8 Port. 326.

⁴ See *Barnard's Heirs v. Ashley's Heirs*, 18 How. 43; *Garland v. Wynn*, 20 How. 6; *Irvine v. Marshall*, 20 How. 558; *Tate v. Carney*, 24 How. 357; *O'Brien v. Perry*, 1 Black, 132; *Lindsey v. Hawes*, 2 Black, 554; *State v. Batchelder*, 1 Wall. 109.

SECTION II.

TITLE BY INVOLUNTARY ALIENATION.

SECTION 751. Title by involuntary alienation, what is?

752. Scope of legislative authority.

753. Eminent domain.

754. Persons under disability.

755. Confirming defective titles.

756. Sales by administrators and executors.

757. Sales under execution.

758. Sales by decree of chancery.

759. Tax-titles.

760. Validity of tax-title.

761. Judicial rules for delinquent taxes.

§ 751. **Title by involuntary alienation, what is? —** Under the head of title by involuntary alienation are included all the modes of transferring one man's title to lands to another, against his will or without his co-operation. Circumstances often arise, when such alienation is necessary to attain the ends of justice. The kinds of involuntary alienation are so numerous, and they are so largely regulated by varying local statutes that in so limited a work as the present it will be impossible to do more than give a general outline and classification of these modes of conveyance, and present the salient features of each.

§ 752. **Scope of legislative authority. —** Except the power, which the court of chancery possesses in certain cases, and which will be explained in the proper place, the power to effect an involuntary alienation rests upon legislative enactment. As a general proposition, the Legislature cannot divest one of his vested rights against his will. It can enact laws for the control of property and of its dispo-

sition, but it cannot take the private property of one man and give it to another.¹ But there are certain well-known exceptions to this general rule, where the interference of the Legislature is necessary to save and protect the substantial interests of individuals on account of their own inability to do so, or to promote the public good. In some of the State Constitutions there is a provision against the enactment of special laws operating upon particular individuals or upon their property. In those States, therefore, involuntary alienation can only be effected by a general law, applicable to all persons under like circumstances. But in the absence of such a constitutional provision, the transfer of lands may be made by special act of the Legislature, as well as under a general law.² But wherever such a transfer by special act of the Legislature would involve the assumption of judicial power, it would be generally held void, under the common constitutional provision which denies to the Legislature the exercise of such powers.³ The cases in which the Legislature may provide for involuntary alienation may be divided into the following six general classes: 1. In the exercise of the right of eminent domain. 2. In the case of persons under disability to protect their interests by sale and investment. 3. For confirming defective titles. 4. Sales by administrators and executors. 5. Sales under execution. 6. Sales to satisfy the claim of the State for taxes.

¹ *Wilkinson v. Leland*, 2 Pet. 658; *Adams v. Palmer*, 51 Me. 494; *Commonwealth v. Alger*, 7 Cush. 53; *Varick v. Smith*, 5 Paige, 159; *Matter of Albany Street*, 11 Wend. 149; *John and Cherry Street*, 19 Wend. 676; *Taylor v. Porter*, 4 Hill, 147; *Heyward v. Mayor*, 7 N. Y. 324; *Bowman v. Middleton*, 1 Bay, 252; *Russell v. Rumsey*, 35 Ill. 374; *Good v. Zercher*, 12 Ohio, 368; *Deutzel v. Waldie*, 30 Cal. 144.

² *Sohier v. Mass. Gen. Hospital*, 3 Cush. 483; *Kibby v. Chitwood*, 4 B. Mon 95; *Edwards v. Pope*, 4 Ill. 473.

³ *Rice v. Parkman*, 16 Mass. 326; *Jones v. Perry*, 10 Yerg. 59; *Lane v. Dorman*, 4 Ill. 238; *Edwards v. Pope*, 4 Ill. 473.

§ 753. **Eminent domain.** — As already explained in the second chapter, all real property is held subject to the exercise of the right of eminent domain. Whenever it is necessary or beneficial to the public that certain lands shall be appropriated for public use, the State through the Legislature has the right to confiscate such land upon payment of a proper compensation therefor to the owner of the land.¹ The State may exercise the right, or it may authorize a corporation of a public character, such as railroads, turnpike companies, etc., to exercise it.² But the corporation must be one in whose maintenance the public is interested, and from whose existence the public is to derive a benefit. The State cannot authorize a private individual or a strictly private corporation to take the lands of another with or without compensation.³

¹ *Haskell v. New Bedford*, 108 Mass. 214; *Commonwealth v. Alger*, 7 Cush. 92; *Clarke v. Rochester*, 24 Barb. 481; *Taylor v. Porter*, 4 Hill, 143; *Heyward v. Mayor*, 7 N. Y. 324; *Buffalo R. R. v. Brainard*, 9 N. Y. 108; *Carson v. Coleman*, 11 N. J. Eq. 108; *Moale v. Baltimore*, 5 Md. 314; *Commissioners, etc., v. Withers*, 29 Miss. 21; *Chicago v. Larned*, 34 Ill. 276; *People v. Salem*, 20 Mich. 479.

² *Cushman v. Smith*, 34 Me. 247; *Hooker v. N. H. & N. Co.*, 14 Conn. 146; *Bloodgood v. Mohawk & H. R. R.*, 18 Wend. 9; *Buffalo R. R. v. Brainard*, 9 N. Y. 108; *Matter of Townsend*, 39 N. Y. 171; *Burt v. Merchants' Ins. Co.*, 106 Mass. 356; *Orr v. Quimby*, 54 N. H. 590; *Reddall v. Bryan*, 14 Md. 444; *Gilmer v. Lime Point*, 18 Cal. 229.

³ *Wilkinson v. Leland*, 2 Pet. 658; *Adams v. Palmer*, 51 Me. 494; *Commonwealth v. Alger*, 7 Cush. 53; *Flagg v. Flagg*, 16 Gray, 180; *Powers v. Bergen*, 6 N. Y. 358; *Varick v. Smith*, 5 Paige, 159; *Heyward v. Mayor*, 7 N. Y. 324; *Taylor v. Porter*, 4 Hill, 147; *People v. Mayor*, 4 N. Y. 422; *Wild v. Deig*, 43 Ind. 455; 13 Am. Rep. 404; *Gillan v. Hutchinson*, 16 Cal. 156. Since it is not imposed upon the State as a public duty to erect and maintain light-houses it cannot appropriate lands for such a purpose; but the United States may do so, and the only power the State has is to cede jurisdiction to the United States over the land thus taken. *Burt v. Merchants' Ins. Co.*, 106 Mass. 360; *People v. Humphrey*, 23 Mich. 471. In like manner the State may grant to the United States the authority to appropriate lands for the erection of post-offices and other public buildings. *Burt v. Merchants' Ins. Co.*, 108 Mass. 356; *Orr v. Quimby*, 54 N. H. 590; *Reddall v. Bryan*, 14 Md. 444; *Gilmer v. Lime Point*, 18 Cal. 229.

§ 754. **Persons under disability.** — Where persons are under a legal disability which prevents them from making a valid sale of their property, and such sale and reinvestment of the proceeds of sale are necessary for the conservation of their interests, the State, in the capacity of *parens patriæ*, has the power to authorize a sale by the guardians of such persons. This may be done by special act or by a general law.¹ The property of persons who are not under a disability cannot be sold by authority of the courts, on the ground that such a sale would be beneficial.² In most of the States there are general laws authorizing the courts to empower the guardians of minors, lunatics, and other persons under disability, to make sale of the real property of such persons. Generally the sales are made under special orders of the court, and in making the conveyance the deed should contain recitals of all the preliminary proceedings, which are necessary to the effectual transfer of the title; but these recitals are not absolutely necessary, provided the deed shows on its face in what capacity the grantor executes the deed.³

§ 755. **Confirming defective titles.** — Generally, when a title is defective through some informality in the execution of the conveyance, upon a proper case being made out, the court of equity will afford an ample remedy by decreeing a reformation of the instrument.⁴ But cases do arise where,

¹ *Sohier v. Mass. Gen. Hospital*, 16 Mass. 326; *s. c.*, 3 Cush. 483; *Davidson v. Johonnot*, 7 Metc. 395; *Cochran v. Van Surlay*, 20 Wend. 365; *Estep v. Hutchman*, 14 Serg. & R. 435; *Doe v. Douglass*, 8 Blackf. 10; *Kibby v. Chitwood*, 4 B. Mon. 95; *Shehan v. Barnett*, 6 B. Mon. 594; *Jones v. Perry*, 10 Yerg. 59.

² *Wilkinson v. Leland*, 2 Pet. 658; *Adams v. Palmer*, 51 Me. 494; *Sohier v. Mass. Gen. Hospital*, 3 Cush. 483; *Heyward v. Mayor*, 7 N. Y. 324; *Ervine's Appeal*, 16 Pa. St. 256; *Palairit's Appeal*, 67 Pa. St. 479.

³ 3 Washb. on Real Prop. 210, 211.

⁴ *Adams v. Stevens*, 49 Me. 362; *Brown v. Lamphear*, 35 Vt. 260; *Andrews v. Spurr*, 8 Allen, 416; *Metcalf v. Putnam*, 9 Allen, 97; *Conedy v. Marcy*, 13

through the absence or death of the parties, or through a want of knowledge as to who they are, it is impossible to obtain a reformation in chancery, and even in cases where the equitable remedy is only troublesome and inconvenient, and the defect is only an informality, which does not go to the essence of the conveyance, and which does not create any doubt as to the intention to make a valid conveyance, the power of the Legislature to interfere and cure the defect by special act has generally been sustained by the courts of those States, where special acts are not inhibited by the Constitution. Thus the defective certificate of a wife's acknowledgment has been perfected by special act.¹

§ 756. **Sales of administrators and executors.** — Where one dies without having made provisions for such contingencies, it is often necessary that some one should be authorized to make a sale of the lands, for the purpose of making an effective administration, and to protect and satisfy the claims of those who are interested in the property. If the deceased leaves a will he very often, perhaps generally, empowers the executor to make sale of the land. Where the executor has this testamentary power, his sales are presumed to be under this power, and there is no need of a resort to the statutory power.² But these express testamentary powers are supplemented by statutes, which authorize courts of probate to order a sale of the decedent's lands by the

Gray, 373; *Prescott v. Hawkins*, 16 N. H. 122; *Caldwell v. Fulton*, 31 Pa. St. 484; *Keene's Appeal*, 64 Pa. St. 274; *Mills v. Lockwood*, 42 Ill. 111; *Gray v. Hornbeck*, 31 Mo. 400.

¹ *Wilkinson v. Leland*, 2 Pet. 627; *s. c.*, 10 Pet. 294; *Watson v. Mercer*, 8 Pet. 88; *Kearney v. Taylor*, 15 How. 494; *Adams v. Palmer*, 51 Me. 494; *Sohier v. Mass. Gen. Hospital*, 3 Cush. 483; *Chestnut v. Shane's Lessee*, 16 Ohio, 599. See *Florentine v. Barton*, 2 Wall, 210; *Bott v. Perley*, 11 Mass. 169; *Jones v. Perry*, 10 Yerg. 59; *Lane v. Dorman*, 4 Ill. 238. But a defective tax-title cannot be made good by legislative enactment. *Conway v. Cable*, 37 Ill. 82.

² *Payne v. Payne*, 18 Cal. 291; *White v. Moses*, 21 Cal. 44.

administrator or executor, whenever necessary to the full performance of his duties. Thus, if the personal property is not sufficient to satisfy all the debts, the administrator or executor may, under order of the court, make a valid sale of the lands, and the proceeds of the sale will constitute in his hands a trust fund, out of which the claims of the creditors must be satisfied.¹ A sale may be authorized by special act of the Legislature, as well as by order of the court under a general law.² In all these cases the deeds of conveyance should contain recitals of the compliance with all the requirements of the statute as to the preliminary proceedings, although perhaps such recitals are not absolutely necessary to the validity of the conveyance, if the authenticity of the grantor to make the conveyance appears otherwise on the face of the deed.³

§ 757. **Sales under execution.**—By the early common law lands were inalienable for any purpose, and they could not in consequence be sold to pay the debts of the owner. But as trade and commerce increased, it became necessary that the creditors should be provided with means for satisfying their claims by compulsory process against the debtor's property. In compliance with the popular demand, the statutes merchant and statutes staple were passed, which created in the creditors an estate in the debtor's lands, whereby he was enabled to enter into possession and satisfy himself out of the rents and profits.⁴ These statutes have

¹ 3 Washb. on Real Prop. 209.

² *Wilkinson v. Leland*, 2 Pet. 627; *Watkins v. Holman*, 16 Pet. 59; *Sohier v. Trinity Church*, 109 Mass. 1; *Langdon v. Strong*, 2 Vt. 234; *Kibby v. Chitwood*, 4 B. Mon. 95; *Shehan v. Barnett*, 6 B. Mon. 594.

³ *Campbell v. Knights*, 26 Me. 224; *Doolittle v. Holton*, 28 Vt. 819; *Kingsbury v. Wild*, 3 N. H. 30; *Griswold v. Bigelow*, 6 Conn. 258; *Sheldon v. Wright*, 5 N. Y. 497; *Worthy v. Johnson*, 8 Ga. 236; *Longworth v. Bank of United States*, 6 Ohio, 536; *Jarvis v. Russick*, 12 Mo. 63; *Planters' Bk. v. Johnson*, 7 Smed. & M. 449; *Jones v. Taylor*, 7 Texas, 240; *White v. Moses*, 21 Cal. 44.

⁴ 2 Bla. Com. 161, 162.

been abolished in England, where they have been superseded by the *writ of elegit*, which bears such a close resemblance to the American statutes of execution that a separate discussion of its principles will not be necessary. In all the American States there are statutes which provide that when a creditor obtains judgment against his debtor, he may cause a writ of execution to be issued against the property of the debtor, under which the sheriff is authorized to make sale of the real property, and to execute the proper deeds of conveyance. The interest which the creditor acquires in his debtor's lands under the execution is so far a vested interest, that he has been held entitled to the crops growing on the land, and to the fixtures attached thereto, and he may restrain the removal of either.¹ And Mr. Washburn calls such interests *estates by execution*.² But they are of so ephemeral a character that it was not considered necessary to discuss them in an independent chapter. If these interests can be called estates, they are a species of estate upon condition, which is defeated by the satisfaction of the judgment and made absolute by sheriff's sale. Where the property has been sold under execution to a stranger he acquires an absolutely indefeasible title, if all the requirements of the statute have been complied with. And where the judgment, on which the execution was issued, has been reversed on appeal, his title remains unaffected by such reversal.³ Where the purchaser is a party to the judgment and the suit under it, a subsequent reversal would defeat his title, since he cannot be called a subsequent purchaser with-

¹ *Coolidge v. Melvin*, 42 N. H. 537; *Evans v. Roberts*, 5 B. & C. 829; *Penhallow v. Dwight*, 7 Mass. 34; *Goddard v. Chase*, 7 Mass. 432; *Heard v. Fairbanks*, 5 Metc. 111; *Whipple v. Foot*, 2 Johns. 423; *Pattison's Appeal*, 61 Pa. St. 297; *Farrar v. Chauffetete*, 5 Denio, 527.

² 2 Washb. on Real Prop. 29.

³ *Feger v. Keefer*, 6 Watts, 297; *Taylor v. Boyd*, 3 Ohio, 337; *Gray v. Brignordello*, 1 Wall. 627; *Parker v. Anderson*, 5 B. Mon. 445. *Contra*, *Delano v. Wilde*, 11 Gray, 17.

out notice. And in all cases of reversal of the judgment, where the purchaser acquires an indefeasible title, the debtor may have his action for damages against the judgment creditor for the injury sustained by the sale of the premises.¹ In order to further protect the creditor, it is provided by most of the State statutes that the judgment, when properly docketed, creates a lien upon all the debtor's real property, which attaches to, and binds, the land into whosoever hands it may come. The judgment lien enables the creditor to sell the land under execution, although it has been conveyed away by him to a purchaser for value. But to make a valid conveyance in the case of a sale under execution, the requirements of the statute must all have been complied with, and usually, as in the case of sales by administrators and guardians, the deed should contain recitals of the proceedings taken.²

§ 758. **Sales by decree of chancery.** — The cases are numerous in which the court of chancery has the power to decree a sale and conveyance, most of which have been already incidentally mentioned, such as the decree of sale in the foreclosure of a mortgage, in the enforcement of an equitable lien, or in making an involuntary partition of joint estates, and the like. Chancery has also the power to sub-

¹ 2 Washb. on Real Prop. 29; *Stinson v. Ross*, 51 Me. 557.

² *Jackson v. Roberts*, 11 Wend. 425; *Weyand v. Tipton*, 5 Serg. & R. 332; *Doe v. Bedford*, 10 Ired. 198; *Den v. Wheeler*, 11 Ired. 288; *Ware v. Bradford*, 2 Ala. 676; *Minor v. President of Natchez*, 4 Smed. & M. 602; *Dunn v. Meriwether*, 1 A. K. Marsh. 158. The return of the sheriff of his proceedings in making the levy is conclusive evidence of the facts there stated in respect to the levy between the debtor and creditor and all other persons claiming under them. *Bott v. Burnell*, 11 Mass. 163; *Whitaker v. Sumner*, 7 Pick. 551. And the recitals of the deed cannot be contradicted as to the power or order of sale, under which the sale was made, by showing that it was made under some other power or order. *Jackson v. Croy*, 12 Johns. 427; *Jackson v. Vanderheyden*, 17 Johns. 167; *Jackson v. Roberts*, 11 Wend. 425; *Snyder v. Snyder*, 6 Binn. 489. See *Ware v. Bradford*, 2 Ala. 676; *Minor v. President of Natchez*, 4 Smed. & M. 602.

ject equitable estates to the claims of creditors by the institution of a suit called the creditors' bill. But all these subjects belong more properly to a treatise on equity jurisprudence than to one on real property, and it is intended to make here only casual mention of them. In all these cases, originally, the court in its decree ordered the holder of the legal title or owner of the land to make the proper deeds of conveyance, upon pain of being punished for contempt of court. If the individual was obstinate, or beyond the jurisdiction of the court, the court was powerless to effect a conveyance. A decree ordering a conveyance did not and could not pass the title.¹ But now courts of equity generally possess the power to authorize some officer of the court, usually the master, to execute the necessary deeds of conveyance, and such deeds will be as effectual in passing an indefeasible title as the sheriff's deed under execution.² Like the sheriff's deed, if an appeal has been taken from the decree, and during the pendency of the appeal the property has been sold and conveyed to a stranger, the title which he thereby acquires will not be affected by the subsequent reversal of the decree. But if the purchaser is a party to the suit, his title will fail, because he is not a purchaser without notice.³ Like other modes of involuntary alienation, the master's deed under an equitable decree of sale must show the proceedings taken and the authority for making the sale, although recitals of these matters do not seem to be absolutely necessary to the validity of the conveyance.⁴

¹ *Ryder v. Innerarity*, 4 Stew. & P. 14; *Mummy v. Johnston*, 3 A. K. Marsh. 220; *Sheppard v. Comm'rs of Ross Co.*, 7 Ohio, 271.

² 3 Washb. on Real Prop. 219.

³ *Galpin v. Page*, 18 Wall. 350; *Jackson v. Cadwell*, 1 Cow. 641; *Taylor v. Boyd*, 3 Ohio, 337; *Gott v. Powell*, 41 Mo. 416; *McJilton v. Love*, 13 Ill. 495; *Reynolds v. Harris*, 14 Cal. 667.

⁴ *Atkins v. Kinnan*, 20 Wend. 241; *Wood v. Mann*, 3 Sumn. 318; *Hamilton v. Crosby*, 32 Conn. 347; *Tooley v. Kane*, 1 Smed. & M. Ch. 518.

§ 759. **Tax-titles.** — The power of taxation is an essential incident to government ; without it the maintenance of government is impossible. Although the power of taxation generally cannot properly be considered of feudal origin, yet in its application to real property it assumes a decidedly feudal character. If the power to tax real property rested solely upon the obligations of citizenship, as most of the authorities seem to hold,¹ then it could only be levied upon those proprietors of lands who were citizens. As a matter of fact, all lands situated within the jurisdiction of the government which levies the tax are taxed for their proportionate share. The levying of a tax upon land, and the enforcement of the levy, are proceedings *in rem* against the land, and not *in personam* against the proprietors.² But whatever may be the proper theory in respect to the character and the authority of taxation, the government has not only the right to levy the taxes necessary for the support of the government, but also to provide means for enforcing the levy. In respect to the collection of taxes assessed against real property, with which alone we are here concerned, all the States have statutory provisions, authorizing certain officers of the government, after the lapse of the proper time, and by instituting the prescribed preliminary proceedings, such as listing and advertising the lands, to sell the lands, upon which the taxes have not been paid, to the highest bidder, usually at public sale, and to appropriate the proceeds of sale, or so much thereof as may be

¹ *Providence Bk. v. Billings*, 4 Pet. 561; *McCulloch v. Maryland*, 4 Wheat. 428; *Opinions of Judges*, 58 Me. 591; *People v. Mayor, etc.*, 4 N. Y. 422; *Clarke v. Rochester*, 24 Barb. 482; *Phila. Ass'n, etc., v. Wood*, 39 Pa. St. 73; *Moale v. Baltimore*, 5 Md. 314; *Doe v. Deavors*, 11 Ga. 79; *Chicago v. Larned*, 34 Ill. 279; *Davison v. Ramsay Co.*, 18 Minn. 482.

² *Cooley on Tax*. 360. In some of the States, however, a distinction is made by statute between resident and non-resident lands, as they are called, imposing a personal liability upon the owners of the resident lands. *Cooley on Tax*. 278, 279.

necessary to the payment of the taxes due and the expenses incurred in the sale. The requirements of the statutes, in order to make a valid sale of lands for unpaid taxes, are in some States very minute, and they vary in detail in every State. It will be impossible here to refer to the details of the statutes, or of the decisions upon them. A discussion of them would in itself constitute a volume of respectable size. The reader is therefore referred to the statutes of his own State and the decisions upon them for a careful study of the law upon tax-titles. So difficult is it to fulfil all the requirements of the law in respect to the tax-titles, that the investigator of titles always looks with suspicion upon a title which depends upon a tax-deed. And the Superior Court of New Hampshire is said to have declared "that a tax-collector's deed was, *prima facie*, void."¹

§ 760. **Validity of a tax-title.** — But notwithstanding the dubious estimation in which a tax-deed is held, if all the requirements of the law as to the preliminary proceedings have been complied with, the tax-deed conveys an absolute title, and the purchaser cannot be divested of it, although he may have paid for it a sum altogether disproportionate to the real value of the land.² How far it is necessary to observe all the minute requirements of the statute, in order to make a valid sale of delinquent lands, is not clearly settled by the courts. Although some of the decisions seem to go to the length of requiring a *strict* and *literal* compliance with *all* the provisions of the statute, yet the better opinion, which seems to be more in consonance with the general drift of authority, is that a *substantial* though *strict* compliance with those provisions of the statute which are intended for the protection of the delinquent proprietor, is all that is necessary; and that a failure to follow the statu-

¹ 3 Washb. on Real Prop. 225.

² Harding v. Tibbils, 15 Wis. 232; Wofford v. McKinna, 23 Texas, 43.

tory provisions, which are intended for the benefit of the State, and which does not affect the interests of the proprietor, will not vitiate the purchaser's title, as against the former owner.¹ In all proceedings at common law, based upon the forfeiture for the failure to perform some public duty in which the title to property is made to pass from the delinquent, the burden of proving that all the provisions of the law of forfeiture had been strictly complied with rests upon the purchaser. This rule has generally been applied to tax-sales, and the decisions cited below² bear out Mr. Blackwell in his description of a tax-title, viz.: "The operative character of the deed depends upon the regularity of the anterior proceedings. The deed is not the title itself, nor even evidence of it. Its recitals bind no one. It creates no estoppel upon the former owner. No presumption arises from the mere production of the deed, that the facts upon which it is based had any existence. When it is shown, however, that the ministerial officers of the law have performed every duty which the law imposed upon them, and every condition essential to its character, then the deed becomes conclusive evidence of title in the grantee according to its extent and purport."³ But it is so difficult for a

¹ *Brown v. Veazie*, 25 Me. 359; *Stevens v. McNamara*, 36 Me. 176; *Langdon v. Poor*, 20 Vt. 15; *Wilson v. Bell*, 7 Leigh, 22; *Rubey v. Huntsman*, 32 Mo. 501; *Ferris v. Coover*, 10 Cal. 589.

² *Stead's Ex'rs v. Course*, 4 Cranch, 402; *Williams v. Peyton's Lessee*, 4 Wheat. 77; *Games v. Stiles*, 14 Pet. 332; *Parker v. Overman*, 18 How. 142; *Little v. Herndon*, 10 Wall. 26; *Jackson v. Shepard*, 7 Cow. 88; *Newell v. Wheeler*, 48 N. Y. 486; *Westfall v. Preston*, 49 N. Y. 349; *Cass v. Bellows*, 31 N. H. 501; *Annan v. Baker*, 49 N. H. 161; *Brown v. Wright*, 17 Vt. 97; *French v. Patterson*, 61 Me. 203; *Polk v. Rose*, 25 Md. 153; *Shearer v. Woodburn*, 10 Pa. St. 511; *Garrett v. White*, 3 Ired. Eq. 131; *Kellogg v. McLaughlin*, 8 Ohio, 114; *Gavin v. Sherman*, 23 Ind. 32; *Scott v. Young Men's Soc.*, 1 Dougl. (Mich.) 119; *Goewey v. Urig*, 18 Ill. 242; *Charles v. Waugh*, 35 Ill. 215; *Morton v. Reads*, 6 Mo. 64; *Nelson v. Giebel*, 17 Mo. 161; *Elliott v. Eddins*, 24 Ala. 508; *Doe v. Ins. Co.*, 8 Smed. & M. 197; *Hamilton v. Burum*, 3 Yerg. 855; *Fitch v. Casey*, 2 Greene (Iowa), 300; *Bucknall v. Story*, 36 Cal. 67.

³ Blackw. Tax Titles, 430.

purchaser to prove in detail the performance of the preliminary proceedings required by the statutes, and it being the policy of the State to provide an effective mode of selling lands for delinquent taxes, statutes have now been passed in some of the States which change the common-law rule of evidence just stated and throw the burden of proof upon the former owner, thereby making the tax-deed *prima facie* evidence of title and of a compliance with the requirements of the law. The power of the Legislature to shift the burden of proof in tax-titles has been often questioned, but it is now an unquestionable rule of law that the Legislature may make the tax-deed *prima facie* evidence of title, but cannot give to it and its recitals the force of a conclusive presumption, that all the preliminary proceedings had been faithfully carried out.¹

§ 761. **Judicial sales for delinquent taxes.** — The cause of the uncertainty, as to the validity of a tax-title, lies in the fact that the proceeding, which culminates in a sale of the land, is generally *ex parte*, no opportunity being given for determining judicially whether the taxes are due, or for properly protecting the interests of the delinquent. In order to avoid this objectionable feature of tax-sales, in some of the States, notably Illinois, it is provided by statute that the tax-collector must institute suit against the delinquent in some court of record, usually the County Court, and he is only authorized to make a sale of the land under the decree or judgment of the court.² The proceeding, although

¹ *Pillow v. Roberts*, 13 How. 472; *Orons v. Veazie*, 57 Me. 517; *Johnson v. Elwood*, 53 N. Y. 435; *Butts v. Francis*, 4 Conn. 424; *Hoffman v. Bell*, 61 Pa. St. 444; *Smith v. Chapman*, 10 Gratt. 445; *Stanberry v. Sillon*, 13 Ohio St. 571; *Siblay v. Smith*, 2 Mich. 486; *Wright v. Dunham*, 13 Mich. 414; *Delaplaine v. Cook*, 7 Wis. 44; *Whitney v. Marshall*, 17 Wis. 174; *St. Louis v. Coons*, 37 Mo. 44; *Abbott v. Lindenbower*, 42 Mo. 162; *s. c.*, 46 Mo. 291; *Briscoe v. Coulter*, 18 Ark. 423; *Allen v. Armstrong*, 16 Iowa, 508; *Genther v. Fuller*, 36 Iowa, 604; *Ray v. Murdock*, 36 Miss. 692; *Bidleman v. Brooks*, 28 Cal. 72.

² *Hills v. Chicago*, 60 Ill. 86; *Webster v. Chicago*, 62 Ill. 302.

differing somewhat from the ordinary action at law, contains its essential features, and has the same general effect as to the conclusiveness of the judgment. If property is sold under such a judgment, the purchaser's title cannot be affected by any irregularity not taken advantage of in the judicial proceeding, unless the irregularity is so gross and so essential as to deprive the court of its jurisdiction over the subject-matter.¹ Where the statute requires certain preliminary proceedings to be observed, in order that the court may obtain jurisdiction, a failure to institute them will vitiate the purchaser's title, notwithstanding the sale rests upon a judgment of the court.² This is certainly the fairest, as well as the most effective, mode of enforcing the payment of taxes, and it is surprising that it has not been adopted by all the States.

¹ *Cadmus v. Jackson*, 52 Pa. St. 295; *Ex parte Kellogg*, 6 Vt. 509; *Carter v. Walker*, 2 Ohio St. 339; *Dentler v. State*, 4 Blackf. 258; *Wall v. Trumbull*, 16 Mich. 228; *Chestnut v. Marsh*, 12 Ill. 173; *Young v. Thompson*, 14 Ill. 380; *Bailey v. Doolittle*, 24 Ill. 577; *Wallace v. Brown*, 22 Ark. 118; *Eitel v. Foote*, 39 Cal. 439; *Mayo v. Foley*, 40 Cal. 281.

² *Thatcher v. Powell*, 6 Wheat. 119; *Woods v. Freeman*, 1 Wall. 398; *Spellman v. Curtenius*, 12 Ill. 409; *Morrill v. Swartz*, 39 Ill. 198; *Fox v. Turtle*, 55 Ill. 377; *Fortman v. Ruggles*, 58 Ill. 207; *McGahan's Case*, 6 Iowa, 331; *Mayo v. Ah Loy*, 32 Cal. 477.

SECTION III.

TITLE BY PRIVATE GRANT.

SECTION 768. Title by private grant, what is?

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769. Principal features and classes of common-law conveyances.

770. Feoffment.

771. Grant.

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773. Release, confirmation and surrender.

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779. What conveyances judicially recognized.

780. Statutory forms of conveyance.

781. Quit-claim deeds.

782. Dual character of common conveyances.

783. Is a deed necessary to convey freeholds?

§ 768. Title by private grant, what is? — The term “grant,” as here used, is generic in signification, and is made to include all modes of private alienation, all conveyances *inter vivos*, as distinguishable from title by devise.¹ The term at common law had a more specific meaning, but this restricted use of it has lost its practical value, and will be mentioned in a subsequent paragraph only for the purpose of explaining the source of modern rules of conveying. Conveyances may be divided into three principal

¹ Mr. Washburn (3 Washb. on Real Prop. 353) cites Mr. Wood to the effect that “the word *grant*, taken largely, is where anything is granted, or passed from one to another; and in this sense it comprehends feoffments, bargains and sales, gifts, leases in writing or by deed, and sometimes by word without writing.” 3 Wood Conv. 7. See 4 Kent’s Com. 491.

classes, viz. : (*a.*) common-law conveyances ; (*b.*) conveyances under the Statute of Uses ; (*c.*) modern conveyances. In this order they will be presented.

(*a.*) COMMON-LAW CONVEYANCES.

§ 769. **Principal features and classes of common-law conveyances.** — A common-law conveyance, using the term in its broadest sense, is one which directly, and by the force of the conveyance itself, transfers the legal title to the grantee. And when so considered, it includes the modern statutory conveyances as well as those which were known at common law. In a more restricted sense, it includes only the latter class. Common-law conveyances may be sub-divided into two classes, viz. : *primary* and *secondary* conveyances. A *primary* conveyance is one which transfers the seisin or estate to one, who has no other interest or estate in the property ; while the conveyance is called *secondary*, when the estate previously created is enlarged, restrained, transferred, or extinguished.¹ The following are enumerated by Blackstone as the principal kinds of primary and secondary conveyances : *Primary*, (1) feoffment ; (2) gift ; (3) grant ; (4) lease ; (5) exchange ; (6) partition. *Secondary*, (1) release ; (2) confirmation ; (3) surrender ; (4) assignment ; (5) defeasance.² A gift, *donatio*, was the name applied to the grant of an estate tail, and differed from a feoffment only in the character of the estate created or granted.³ An *exchange* was an ancient conveyance, now obsolete, whereby a mutual grant of equal interests is effected, the one in consideration of the other, the peculiar value of which was its capacity to take effect without livery of seisin, and merely by entry into possession. But the interests or estates had to be equal in quantity ; an estate in fee could not be *exchanged* for one for life or for years,

¹ 2 Bla. Com. 309.

² 2 Bla. Com. 310.

³ 2 Bla. Com. 316, 317.

although they may be of equal pecuniary value.¹ *Partition*, if voluntary, differs now very little, if any, from the more common modes of conveyance. *Partition* is made by ordinary deeds of indenture, conveying to each of the partitioners his share in severalty.² Involuntary partition is, as the term implies, a species of involuntary grant effected through the decree of the court.³ *Defeasance* deeds have been already fully discussed in the chapter on mortgages, and will require no further elucidation.⁴ Assignment is more properly a transfer of an interest already created than a peculiar mode of acquiring title. When applied to the subject of conveyancing generally, it may be treated as synonymous with the generic term *conveyance*. Its peculiar signification in its application to estates for years has been already explained.⁵ The remaining common-law conveyances will now be explained somewhat in detail.

§ 770. **Feoffment.** — This was the chief common-law conveyance for the transfer of freehold estates in corporeal hereditaments, and arose out of the peculiarities of the feudal relation between the lord and his tenants. The word *feoffment* is derived from the verb *feoffare*, or *infeudare*, to give one a feud. It is, therefore, in its original sense, the grant of a feud, *donatio feudi*.⁶ This is the only primary common-law conveyance now known to us which is capable of transferring a freehold. It is said to operate by transmutation of possession. It has no effect if there be no delivery of the possession. In fact, the feoffment is itself nothing more than the delivery of the possession with the intention to grant an estate of freehold. The grantor was called the *feoffor* and the grantee the *feoffee*. The feoffor, in order to make the conveyance, went upon the land with the feoffee, and in the presence of witnesses delivered to

¹ 2 Bla. Com. 323.

² See *ante*, sect. 260.

³ See *ante*, sect. 261.

⁴ See *ante*, sects. 302–307.

⁵ See *ante*, sect. 182.

⁶ 2 Bla. Com. 310; Co. Lit. 9.

the latter a clod of earth, or a twig, or some other thing taken from the land, which was treated as a symbolical delivery of the land itself. The feoffee, who during this time was standing near the border, but on the outside of the land, then entered upon it, and the conveyance was complete. This ceremony was called livery of seisin.¹ No writing was necessary. Indeed, at first a deed of feoffment was unusual. But later on, when the exigencies of advancing civilization called forth the grant of lands to different persons with different estates, or interests therein, upon various conditions, and under multitudinous limitations, it was found necessary to accompany the livery of seisin with a deed, explaining and setting forth the terms and conditions of the conveyance, in order to avoid the mistakes of the witnesses, which would naturally occur if they had to rely upon their memory. But not until the enactment of the Statute of Frauds in the reign of Charles II. was it necessary for a feoffment to be evidenced by a writing.² The conveyance by feoffment passed the actual seisin in fee or for life according to the terms of the gift, whether the feoffor had an estate in the land or not. "If it proposed to convey a fee simple, it created an actual fee simple in the feoffee, by right or by wrong, according as the feoffor was or was not seised in fee."³ In consequence of this

¹ This symbolical delivery of possession is very ancient, and has been employed by almost all of the historical nations. Thus we read in the Old Testament of the Bible, Ruth, iv:7: "Now this was the manner in former time, in Israel, concerning redeeming and concerning changing, for to conform all things: a man plucked off his shoe and gave it to his neighbor; and this was a testimony in Israel." Blackstone also tells us that contracts for the sale of lands were made among the Goths and Swedes in the presence of witnesses, who extended the cloak of the buyer, while the seller cast a clod of the land into it, in order to give possession; while a staff or wand was also delivered from the vendor to the vendee, which passed through the hands of the witnesses. 2 Bla. Com. 313.

² 2 Bla. Com. 310-317; Williams on Real Prop. 147; 3 Washb. on Real Prop. 233, 351.

³ 3 Washb. on Real Prop. 351.

doctrine, a tortious feoffment disseised the rightful owner, and until entry by him he was as absolutely divested of his seisin as if he had made the feoffment himself. And where one attempted to make a feoffment of a greater estate than he possessed, his feoffee would acquire a tortious estate, and the smaller estate which the feoffor actually possessed would be lost or merged in the tortious estate so granted. His feoffee, therefore, acquired no indefeasible estate, and could be ousted at once by the rightful owner of the reversion. This explains the tortious operation of feoffments by the tenants of particular estates upon contingent remainders, which has already been explained.¹ In England, and in most of the States of this country at the present day, feoffments have been either abolished altogether, or they have by statute been prevented from having any tortious operation upon future expectant estates.² The doctrine of seisin has been so fully explained in preceding chapters that nothing further need here be said of it.

§ 771. **Grant.** — Conveyance by grant, at common law, was the method of transferring or creating estates in incorporeal hereditaments. These rights being intangible or incorporeal, they could not be transferred by livery of seisin. “For which reason all corporeal hereditaments, such as lands and houses, are said to lie *in livery*; and the others, advowsons, commons, rents, reversions, etc., to lie *in grant*.”³ Conveyance by grant could only be made by

¹ See *ante*, sect. 422.

² 4 Kent's Com. 481; 3 Washb. on Real Prop. 351; Williams on Real Prop. 146. In Alabama, Maine, New York, Wisconsin, Massachusetts, Minnesota and Michigan. 1 Washb. on Real Prop. 120. See *Grout v. Townshend*, 2 Hill, 554; *McCorry v. King's Heirs*, 3 Humph. 267; *Dennett v. Dennett*, 40 N. H. 505. In South Carolina the tortious operation of feoffment is still recognized as an active element of the law, and it affords to heirs, who are dissatisfied with the tenancy for life given to them by will, ready means for defeating the contingent remainders over and acquiring the fee simple. See *Faber v. Police*, 10 S. C. 376.

³ 2 Bla. Com. 317.

deed. In this respect the law is still unchanged. But the deed of grant differs in form but little from the deed of feoffment, the same operative words being used in both, *dedi et concessi*, “have given and granted.” But the deed of feoffment is inoperative as a conveyance, it simply acts as an attestation of the conveyance made by the livery of seisin. At common law corporeal hereditaments could not be transferred by grant.¹ Another important distinction between feoffment and grant was that a deed of grant could not be made to create a tortious estate. A grant only conveys what the grantor had a right to convey. It cannot work a disseisin of the reversioner.²

§ 772. **Lease.** — This is properly a conveyance of a particular estate in lands, whether for life, or for years, or at will, where a reversion is left in the grantor.³ But at present the term is used to indicate the conveyance of an estate less than a freehold. Used in that sense, it is a contract between lessor and lessee, vesting in the latter a right to the possession of the land for a term of years. Until possession is taken it is merely a *chose in action*, an executory contract, which is called an *interesse termini*. It becomes an estate when it takes effect in possession. No livery of seisin is required, and the lessee merely enters upon the land.⁴ It is for this reason that an estate for years could be made to commence *in futuro*, while it was impossible to do so with a freehold.⁵

§ 773. **Release, confirmation and surrender.** — These three secondary conveyances are so nearly allied to each

¹ 2 Bla. Com. 317; 3 Washb. on Real Prop. 352; *Huff v. McCauley*, 53 Pa. St. 206; *Drake v. Wells*, 11 Allen, 143; 2 Shars. Bla. Com. 206, note.

² Co. Lit. 271 b, Butler's note; 4 Kent's Com. 353; 3 Washb. on Real Prop. 352.

³ 2 Bla. Com. 317.

⁴ 2 Bla. Com. 318. See *ante*, sects. 174, 178..

⁵ See *ante*, sect. 175.

other that they will be explained and distinguished in a single paragraph. A release, as defined by Blackstone, "is a discharge or a conveyance of a man's right in lands or tenements to another that held some former estate in possession. The words generally used therein are *demised, released* and *forever quit-claimed*." ¹ A virtual possession, *i.e.*, a constructive possession which may be converted into an actual possession, is sufficient. And the possession of the lessee of a tenant for life is so far the possession of the tenant for life that the reversioner may make a release to him (the life tenant) of the reversion.² The deed of release may be used in the following cases: *First*, to enlarge a particular estate in possession; as where the reversioner releases the inheritance to the tenant for life. But the reversion must be immediate to the particular estate. An outstanding intermediate estate would prevent a release of the reversion to the tenant in possession.³ *Secondly*, to pass the interest of one coparcener or joint-tenant to another. *Thirdly*, to transfer to a disseisor the disseisee's right of entry, and thus make the disseisor's title absolute.⁴ A confirmation is, according to Lord Coke, "a conveyance of an estate or right *in esse*, whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is increased."⁵ The operative words in a confirmation are "have given, granted, ratified, approved, and confirmed."⁶ A surrender operates to transfer a particular estate to the immediate reversioner, and is effected by the words, "hath surrendered, granted, and yielded up." But it can only take effect where the surrenderor has an estate in possession, and the surrenderee has a higher estate in immediate reversion.⁷ In all these cases the transfer is made by force of the deed of release,

¹ 2 Bla. Com. 324.

⁵ 2 Bla. Com. 325; 1 Inst. 295.

² Co. Lit. 270 a; Hargrave's note, 3.

⁶ 2 Bla. Com. 325.

³ Co. Lit. 273 b.

⁷ 2 Bla. Com. 326.

⁴ 2 Bla. Com. 324, 325.

confirmation or surrender, and does not require livery of seisin in the first two cases, viz. : release and confirmation, because the transferee has the seisin already, and in the case of surrender because the seisin of the surrenderor, having been acquired originally from the surrenderee, is subordinate to the seisin in law of the surrenderee, his reversioner, the estates of the two together constituting one and the same seisin.¹ At the present day the ordinary quitclaim deed, so-called, has all the qualities of the release or confirmation, and is effective in any of these cases to convey the interest of the grantor.²

(b.) CONVEYANCES UNDER THE STATUTE OF USES.

§ 774. **Retrospection.** — It will be remembered, in discussing the subject of uses and trusts, it was stated that a use could be created originally by a simple oral declaration of the legal owner of the land, that he held it to the use of another, provided the declaration was made for a good or valuable consideration.³ The Statute of Frauds subsequently required all creations or grants of uses and trusts to be manifested by some instrument in writing signed by the party to be charged.⁴ And although it has become customary to create uses by instruments having all the formalities of a deed, it is not necessary. These uses, when based upon a consideration, were enforced in equity as readily as if there had been a feoffment to uses.⁵ It has also been shown that when the Statute of Uses was enacted, all uses *in esse*, and vested, became at once executed into legal estates, the seisin being transferred to the *cestui que use* by force of the statute, and the future contingent uses were executed whenever they became vested.⁶ After the passage of the Statute of Uses, therefore, it was possible to convey the legal estate

¹ 2 Bla. Com. 324-327.

² See *post*, sect. 781.

³ See *ante*, sects. 444.

⁴ See *ante*, sects. 442, 444, 507.

⁵ See *ante*, sect. 444.

⁶ See *ante*, sects. 459, 460, 470.

without making use of any of the primary common-law conveyances which operated by transmutation of possession, and required a livery of seisin. The grantor had only to make a declaration of uses upon sufficient consideration. His declaration vested the use or equitable estate in the grantee, and the statute immediately executed it into a legal estate and transferred the seisin to him. Thus was avoided the necessity of a resort to the cumbersome and ceremonial feoffment and livery of seisin. With this explanation, and a knowledge of the doctrine of uses and trusts, it is not difficult to understand the operation of the deeds of *covenants to stand seised, bargain and sale, and lease and release*. The deeds themselves vest in the grantee only the use or equitable estate. The legal estate and seisin are transferred by the Statute of Uses. And where any one of these deeds creates a future and contingent use which cannot be executed by the statute, the operation of the statute upon the deed will be suspended in respect to such interest, until it has become vested and in a position to be executed.

§ 775. **Covenant to stand seised.** — This is a covenant between near relatives by blood or marriage, founded upon the *good* consideration of natural love and affection, that the covenantor, the legal proprietor of the land, shall stand seised to the use of the covenantee. But the conveyance can only operate as a covenant to stand seised when it is made upon the consideration of blood or marriage.¹

§ 776. **Bargain and sale.** — This deed is in the nature of a contract, in which the bargainor for a valuable considera-

¹ 2 Bla. Com. 338; 2 Saunders on Uses, 82; 2 Rolle Abr. 784, pl. 244; Emery v. Chase, 5 Me. 232. Although it is usual for the covenant to be made with the person who is to receive the benefit of the use, it is not necessary. A. may covenant with B. to stand seised to the use of C., A.'s wife or child. Co. Lit. 112 a; Bedell's Case, 7 Rep. 40; Brewer v. Hardy, 22 Pick. 376; Leavett v. Leavett, 47 N. H. 329; Barrett v. French, 1 Conn. 354; Hayes v. Kershaw, 1 Sandf. Ch. 258.

tion bargains and sells the land to the bargainee, and, under the doctrine of equitable conversion, becomes the trustee for the bargainee, holding the legal title and seisin in this fiduciary capacity. As it appears from this definition, the bargain and sale must be founded upon a valuable consideration, *i.e.*, money, or money's equivalent. But the consideration need not be an adequate compensation for the land. The covenant to stand seised, and the bargain and sale are to be distinguished by the relation of the parties, and the consideration upon which the conveyance rests, and not by the operative words. "Covenant to stand seised" is the operative clause in the conveyance of that name, but neither it nor "bargain and sell" has any technical, precise legal import; and a covenant to stand seised, if founded upon a valuable consideration, will operate as a bargain and sale between strangers; while, on the other hand, a bargain and sale deed without valuable consideration will operate as a covenant to stand seised between near relations.¹ In England by statute no bargain and sale can have the effect, under the Statute of Uses, of vesting the legal title in the bargainee, unless it is made by deed, and enrolled within six months in one of the courts of Westminster Hall, or with the *custos rotulorum* of the country.² This statute has never been in force in the United States.³

§ 777. **Future estates of freehold in bargain and sale.** — It has been held in unqualified terms by the courts of Massachusetts and Maine, that a freehold estate to commence *in futuro* cannot be created by a bargain and sale deed.⁴ But

¹ Co. Lit. 40 b; 2 Inst. 672; 1 Prest. Conv. 38; *Daviess v. Speed*, 12 Mod. 39; *Trafton v. Hawes*, 102 Mass. 533; *Jackson v. Cadwell*, 1 Cow. 639; *Eckman v. Eckman*, 68 Pa. St. 460. See *post*, sect. 782.

² 2 Bla. Com. 338; 3 Washb. on Real Prop. 313.

³ *Rogers v. Eagle Fire Ins. Co.*, 9 Wend. 611; *Jackson v. Wood*, 12 Johns. 74; *Jackson v. Dunsbrough*, 1 Johns. 97; *Given v. Doe*, 7 Blackf. 210; *Welch v. Foster*, 12 Mass. 96; *Report of Judges*, 3 Binn. 156.

⁴ *Marden v. Chase*, 32 Me. 329; *Pray v. Pierce*, 7 Mass. 381; *Gale v. Coburn*, 18 Pick. 397; *Brewer v. Hardy*, 22 Pick. 376.

it has been held very generally elsewhere, that such a deed is capable of creating a future estate of freehold, and even the courts of the States above named have finally come to the same conclusion, overruling the prior decisions to the contrary.¹ It is difficult to see how this error could have gained such recognition. Bargain and sale, and covenant to stand seised, rest upon the same foundation, that they both create uses in the grantee, and operate under the Statute of Uses. And there is no better established rule in respect to the subject of uses and trusts than that a use is free from the restrictions controlling the limitation of common-law legal estates, which arise from the doctrine of seisin, and the necessity of livery of seisin, in order to convey a title.

§ 778. **Lease and release.** — This conveyance is stated to have been invented by Sergeant Moore soon after the passage of the Statute of Enrolment, and consists of two separate instruments, a lease and a release, and was introduced to avoid the necessity of enrolling the bargain and sale. The lease is for one year, in the form of a bargain and sale, which need not have been enrolled, since the statute referred only to freeholds. This *bargain and sale* lease vested a use for one year in the lessee, and the statute transferred to him the possession and the legal title. Being then in possession as tenant, he was in a position to receive a grant of the reversion or freehold by way of a release.² This is, perhaps, the most effective of the conveyances under the Statute of Uses, and in England it superseded to a large extent both the covenant to stand seised and bargain and sale deeds.

¹ *Shapleigh v. Pilsbury*, 1 Me. 271; *Wyman v. Brown*, 50 Me. 150; *Jordan v. Stevens*, 51 Me. 79; *Drown v. Smith*, 52 Me. 141; *Jackson v. Swart*, 20 Johns. 87; *Jackson v. McKenny*, 3 Wend. 235; *Hayes v. Kershaw*, 1 Sandf. Ch. 267; *Bank v. Housman*, 6 Paige, 526; *Rogers v. Eagle Fire Ins. Co.*, 9 Wend. 611; *Trafton v. Hawes*, 102 Mass. 533.

² 2 Bla. Com. 337.

The possession, acquired by the *bargain and sale* lease, is only such a constructive possession which is sufficient to support the release, and does not give to the lessee the right to maintain actions in respect to the possession until he has gained actual possession by entry.¹ Both the lease and the release are common-law conveyances, but the lease, operating as a common-law conveyance, vests in the lessee before entry only an *interesse termini*, and not an estate. It must operate as the limitation of a use under the Statute of Uses, in order to give the lessee an estate with constructive possession. The release itself is a common-law conveyance, and operates as such in this connection. In England it had to operate as a common-law conveyance to do without enrollment. But in this country it may operate just as well as the limitation of a future use as a release of a future legal estate.²

(c.) MODERN CONVEYANCES.

§ 779. What conveyances judicially recognized. — Although there is an almost infinite variance to be found in the rules of conveyancing in the different States of the country, it is believed that all the modes of conveyancing, which were recognized by the English common law, heretofore discussed, and those which operated under the Statute of Uses are recognized as valid and effective to pass the legal title. In New York deeds of feoffment with livery of seisin are expressly abolished by statute,³ while in other States they remain as a valid, though somewhat obsolete, conveyance. In most of these States, in order that a deed of feoffment may take effect as such, it must still be accompanied with the ceremonial livery of seisin. But in several of the States, notably Massachusetts, Maine, Mississippi, Pennsylvania, Missouri, Connecticut, Rhode Island, the recording and delivery of a deed of feoffment is equivalent to the actual

¹ 3 Washb. on Real Prop. 356.

² 3 Washb. on Real Prop. 355.

³ 1 Rev. Stat. N. Y. 738.

livery of seisin, and dispenses with it.¹ The conveyances under the Statute of Uses are also recognized, and in Arkansas, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Kentucky, Maryland, Michigan, Minnesota, Mississippi, Missouri, New Hampshire, New Jersey, Pennsylvania, Vermont and Virginia, the deed in general use is substantially a *bargain and sale*.² In no State is it thought impossible to make a valid conveyance by deed operating under the Statute of Uses.³

§ 780. **Statutory forms of conveyance.** — But in addition to the forms of conveyance already discussed, there are found in some of the States others, which are prescribed by statute and made effectual to pass the legal title. Such forms are to be found in New Hampshire, South Carolina, Pennsylvania, New York, Iowa, Maryland and Tennessee. The use of these forms, however, is not made obligatory. The statute is construed to be directory, and does not invalidate the other modes of conveyance which were previously in use. A bargain and sale or a feoffment would be just as effectual now as formerly.⁴ In New York, as previously stated, feoffments have been abolished, and all conveyances, whether they are in form a feoffment or a deed under the Statute of Uses, are by statute made to operate as, and are

¹ *Pray v. Pierce*, 7 Mass. 381; *Russell v. Coffin*, 8 Pick. 143; *Barrett v. French*, 1 Conn. 354; *Bryan v. Bradley*, 16 Conn. 481; *Caldwell v. Fulton*, 31 Pa. St. 483; *Wyman v. Brown*, 50 Me. 160; *Williamson v. Carleton*, 51 Me. 462; Mississippi Code (1871), sect. 2294; Rev. Stat. R. I., ch. 146, sect. 1; *Perry v. Price*, 1 Mo. 553; *Poe v. Domec*, 48 Mo. 441.

² 2 Washb. on Real Prop. 452.

³ *Givan v. Doe*, 7 Blackf. 212; *Funk v. Creswell*, 5 Iowa, 68; *Brewer v. Hardy*, 22 Pick. 376; *Barrett v. French*, 1 Conn. 354; *Tabb v. Baird*, 3 Call, 475; *Duval v. Bibb*, 3 Call, 362; *Rogers v. Eagle Fire Ins. Co.*, 9 Wend. 611.

⁴ 3 Washb. on Real Prop. 360; *Chamberlain v. Crane*, 1 N. H. 64; *French v. French*, 3 N. H. 234; *Pritchard v. Brown*, 4 N. H. 397; *Funk v. Creswell*, 5 Iowa, 68; *Redfern v. Middleton*, Rice, 464; 2 Washb. on Real Prop. 447; *Miller v. Miller*, Meigs, 484.

called, grants.¹ And in Georgia a statute provides that any deed which clearly shows the intention of the party to convey the title to lands, shall be effectual for that purpose. No form is prescribed, and no want of form will invalidate the transaction.²

§ 781. **Quit-claim deed.** — Although a deed of release is a secondary conveyance, and is only effectual in conveying a reversionary or equitable interest to one already possessed of an estate in possession, a form of deed similar to the release, and known as a quit-claim deed, has met with general recognition in this country, and has in some of the States been expressly recognized by statute.³ In Kentucky release is by statute made a primary conveyance.⁴ But a quit-claim deed only passes that interest which the grantor has at the time of conveyance, and the grantee under it has not the equities of a *bona fide* purchaser. If the title should fail there is no remedy against the grantor, for a quit-claim deed contains no covenants of title.⁵ And should the grantor subsequently acquire the title, no estoppel arises against him in favor of the grantee, to prevent his enforcement of the title.⁶ Quit-claim deeds contain usually as their operative words “remise, release, and forever quit-claim,” but the form may be varied. And where there are no technical words of sale and conveyance, the quit-claim deed has been

¹ 1 Rev. Stat. N. Y. 738.

² 3 Washb. on Real Prop. 361.

³ It is so recognized in Minnesota, Maine, Mississippi, Massachusetts and Illinois. 3 Washb. on Real Prop. 359, notes. See also *Brown v. Jackson*, 3 Wheat. 452; *Jackson v. Bradford*, 4 Wend. 619; *Jackson v. Hubble*, 1 Cow. 613; *Rogers v. Hillhouse*, 3 Conn. 398; *Dart v. Dart*, 7 Conn. 255; *Hall v. Ashby*, 9 Ohio, 96; *McConnell v. Reed*, 5 Ill. 117; *Hamilton v. Doolittle*, 37 Ill. 482; *Bogy v. Shoab*, 13 Mo. 380; *Kerr v. Freeman*, 33 Miss. 292; *Touchard v. Crow*, 20 Cal. 150; *Carpentier v. Williamson*, 25 Cal. 168.

⁴ 3 Washb. on Real Prop. 360.

⁵ *May v. LeClair*, 11 Wall. 232; *Kyle v. Kavanagh*, 103 Mass. 356; *Thorp v. Keokuk Coal Co.*, 48 N. Y. 253; *Sherwood v. Barlow*, 19 Conn. 471.

⁶ *Bruce v. Luke*, 9 Kan. 201; 12 Am. Rep. 491.

held effectual to pass the title, provided words of transfer, or words evidencing the intention to transfer, are present.¹ Quit-claim deeds are practically nothing more than deeds without covenants of title, and they will operate as primary or secondary conveyances according to the circumstances of the parties in respect to the land, at least in those States where the quit-claim deed is recognized as a primary conveyance.

§ 782. **Dual character of common conveyances.** — The character of the conveyance is in the first instance determined by the operative words of conveyance appearing in the deed. The forms of expression, characteristic of the various modes of conveyance, have been given in connection with the description of them. The ordinary deed, usually found in general use in the United States, contains the operative words, “give, grant, bargain and sell.” “Give and grant,” *do et concedo*, were used in the deed of feoffment and grant, and are common-law words of conveyance. “Bargain and sell,” as has already been explained, are the operative words of bargain and sale deeds. By a course of judicial legislation, going far back into the common law of Lord Coke’s day, in order to effectuate the intention of the parties, when clearly manifested, a deed has been held to operate as that mode of conveyance which best carries out the intention of the parties, provided there are sufficient operative words to bring the deed within that class of conveyances. Where, therefore, a deed contains the words “give, grant, bargain, and sell,” it may operate either as a bargain and sale under the Statute of Uses, or as a feoffment at common law, if there is livery of seisin, or if livery is dispensed with by statute or by judicial legislation;² or further, it may

¹ *Fash v. Blake*, 38 Ill. 367; *Johnson v. Boutock*, 38 Ill. 114.

² See *ante*, sect. 779.

operate as the modern statutory conveyance, provided the operative words are the same as prescribed by the statute.¹ In most of the cases arising under this rule of construction the deed is inoperative as one mode of conveyance on account of some defect in the execution, or in the nature of the grant, and complies with the requirements of some other mode of conveyance. Thus a deed of release will take effect as a covenant to stand seised, if there is a limitation of a future freehold estate which cannot be created by a common-law conveyance.² So also will release be treated as a bargain and sale, where it would be invalid as a release, because it is made to a party not in possession of the land. The words of release raise a use in favor of the releasee.³ A use may be raised by any words showing the intention to convey a title. In a case in Virginia the words of conveyance were "give, grant, and deliver," and the court held it to be a good bargain and sale.⁴ It is also a well established rule that deeds operating under the Statute of Uses will be treated as bargains and sales, or as covenants to stand seised, whatever may be the words of conveyance, according to the consideration present to support the conveyance. If it is a good consideration it will be a covenant to stand seised, and a bargain and sale if the consideration is valuable.⁵ So also, if the operative words are "give, grant, bargain, and sell," and the like, will the deed be treated as a common-law conveyance if it cannot operate as a bargain and sale, or a covenant to stand seised, for the want of a good or valuable

¹ 3 Washb. on Real Prop. 357; Sheppard Com. Assur. 82, 83.

² *Roe v. Tranmarr*, 7 Willes, 682; *s. c.*, 2 Smith's Ld. Cas. 288; *Smith v. Frederick*, 1 Russ. 210; *Haggerston v. Hanbury*, 5 B. & C. 101; *Gibson v. Minet*, 1 H. Bl. 569; *s. c.*, 3 T. R. 481.

³ *Pray v. Pierce*, 7 Mass. 381; *Marshall v. Fisk*, 6 Mass. 24; *Russell v. Coffin*, 8 Pick. 143; *Jackson v. Beach*, 1 Johns. Cas. 401.

⁴ *Rowletts v. Daniel*, 4 Munf. 473; *Tabb v. Baird*, 3 Call, 475.

⁵ *Cox v. Edwards*, 14 Mass. 492; *Brewer v. Hardy*, 22 Pick. 376; *Trafton v. Hawes*, 102 Mass. 533; *Barrett v. French*, 1 Conn. 354; *Cheney v. Watkins*, 1 Harr. & J. 527; *Okison v. Patterson*, 1 Watts & S. 395.

consideration.¹ And where there is a grant in such a deed to A. to the use of B., since the policy of the courts of this country is to execute all uses, and vest the legal title in the *cestui que use* whenever it is possible, the deed will be treated as a common-law conveyance, since such a limitation in a bargain and sale would create a use upon a use, which cannot be executed.² That a bargain and sale to A. to the use of B. raises a use upon a use, and gives the legal title to A. under the Statute of Uses, is the settled rule of the courts of those States where the doctrine of ulterior uses, or use upon a use, has not been abolished by statute.³ A deed may also as to one limitation operate as a common-law conveyance, while it may be treated as a conveyance under the Statute of Uses in respect to another limitation, if such a construction is necessary to carry out the intention of the parties.⁴ But when it is desired that a deed should operate as a particular mode of conveyance it must possess all the requisites of that conveyance. And although by this liberal and accommodating rule of construction it is not likely for a common and ordinary grant to be made, which will not possess the requisites of some form of conveyance, and which cannot take effect in consequence, yet it is possible, and where the grant is so singularly defective it will, of course, be void and inoperative.⁵

¹ *Emery v. Chase*, 5 Me. 232; *Bryan v. Bradley*, 16 Conn. 474; *Adams v. Guerard*, 29 Ga. 676; *Cheney v. Watkins*, 1 Harr. & J. 527.

² *Thatcher v. Omans*, 3 Pick. 522; *Bacon v. Taylor*, Kirby, 368; *Marshall v. Fisk*, 6 Mass. 24; *Hunt v. Hunt*, 14 Pick. 374; *Jackson v. Sebring*, 16 Johns. 515; *Sprague v. Woods*, 4 Watts & S. 194. See *Linville v. Golding*, 11 Ind. 374.

³ See *ante*, sect. 463.

⁴ *Emery v. Chase*, 5 Me. 232; *Bryan v. Bradley*, 16 Conn. 474.

⁵ *Emery v. Chase*, 5 Me. 232; *Jackson v. Sebring*, 16 Johns. 515; *Jackson v. Cadwell*, 1 Cow. 622; *Marshall v. Fisk*, 6 Mass. 24; *Carroll v. Norwood*, 5 Harr. & J. 155; *Den v. Hanks*, 5 Ired. 30; *Foster v. Dennison*, 9 Ohio, 121. In *Den v. Hanks*, *supra*, the deed could not operate as a bargain and sale, because no consideration was expressed or proved. It could not take effect as a covenant to stand seised, for there was no blood relationship between the par-

§ 783. Is a deed necessary to convey freeholds? — By the term “deed” is meant an instrument under seal.¹ The question, therefore, which is mooted here is, whether a *sealed* instrument is necessary to convey the legal title to a freehold estate. It has been so long, and so generally considered indispensable, unless abolished by statute, that, although irresistibly driven to the conclusion, it was with some hesitation that the contrary position, with qualifications, has been here assumed. The position is, that for the conveyance of a *legal* freehold estate in a corporeal hereditament, a sealed instrument is not necessary, unless a statute expressly requires it. There were two principal classes of conveyances in England, viz.: common-law conveyances, operating by transmutation of possession, and conveyances under the Statute of Uses. The principal common-law conveyances, and those which concern us in the present discussion, were “feoffment” and “grant.” *Grant* was used to convey incorporeal hereditaments and reversionary interests in corporeal hereditaments, and *required* a sealed instrument.² *Feoffment* was used to convey corporeal freeholds in possession, and consisted of the ceremonial livery of seisin. *No deed, or any other writing*, was required, although it was customary to employ a deed, where the limitations were numerous and intricate.³ In respect to the conveyances under the Statute of Uses, it is a well known fact that uses before the Statute of Frauds could be created in corporeal hereditaments by an oral declaration, which would be executed by the Statute of Uses into a legal estate, if it was supported by a sufficient consideration,⁴

ties to import a good consideration, and it could not operate as a feoffment, because there had been no livery of seisin. The deed was therefore declared void.

¹ See *post*, sects. 787, 808.

² See *ante*, sect. 771.

³ See *ante*, sect. 770; Williams on Real Prop. 147, 152.

⁴ See *ante*, sects. 444, 774. The Statute of Uses expressly states this to be the case. The statute enacts that “where any person stood or were seised

except in one case, viz.: in the case of a bargain and sale. By statute, 27 Hen. VIII., ch. 16, commonly called and known as the Statute of Enrollment, it was enacted that no bargain and sale shall have the effect of conveying the legal title to a freehold estate, unless it is in writing, *indented* and *sealed*, and enrolled in one of the King's courts at Westminster.¹ From this synoptical statement it is evident, therefore, that, using the language of Mr. Washburn, "prior to the Statute of Frauds, in the time of Charles II., it did not require a written instrument to convey corporeal hereditaments, except as provided in the matter of deeds of bargain and sale."² But it was at an early day held impossible to create a use in any incorporeal hereditament, such as rents, which required a deed at common law, unless it was declared by deed.³ Now the Statute of Frauds only required an instrument in writing, signed by the grantor, and *did not* require it to be sealed. After the passage of the Statute of Frauds, therefore, except as to bargains and sales and grants,⁴ a deed was not required to make an effectual conveyance. *Feoffments* could be made by a simple instrument in writing, and it would seem that a *covenant to stand seised* did not actually require a seal, although a covenant is a sealed instrument; for it is stated unqualifiedly by the old authorities that, for the creation of a use, an oral declaration was sufficient, but it required a *valuable* consideration to create a use in a stranger, and a *good* consider-

* * * of and in any honours, castles, lands, etc., to use, etc., of any other person, etc., by reason of any bargain, sale, feoffment, * * * *covenant, contract, agreement, will, or otherwise,*" etc. See *ante*, sect. 459, note.

¹ 3 Washb. on Real Prop. 421.

² 3 Washb. on Real Prop. 421, 422.

³ 2 Washb. on Real Prop. 392; 2 Bla. Com. 331; 1 Spence Eq. Jur. 449.

⁴ It must not be understood that any reference is made here to the common-law *secondary* conveyances, such as a *release*, exchange or surrender. These conveyances were all in the nature of a "grant," and required a deed. See *ante*, sects. 769, 773.

ation to vest it in a blood relation.¹ But although a deed was not required before, or after, the Statute of Frauds, except in the case of *grants* and *bargains and sales*, it was always customary to use them. In the early days of the feudal system, the great lords and barons were ignorant of the art of writing, and could not sign their names; but they all possessed seals, and when any important writing was required to be executed, they sealed it with their own seals, instead of signing.² From the solemnity of the act of sealing, a seal was, at an early day, held to import a consideration. If, therefore, a sealed instrument was used in the declaration of a use, no actual consideration was necessary to support the use, if some sufficient consideration was acknowledged in the deed.³ But if it was an oral declaration, a consideration had to be proved in order to raise a use. To avoid, therefore, the necessity of a consideration, it was the common custom to use a sealed instrument. This was the state of the law in England at the time of the American revolution. The next question is, What is the condition of the law in America? It follows, as a necessary consequence, that in those States which have expressly or impliedly adopted the common law of England, except so far as it is modified by statute, or repugnant to the political institutions of this country, the law in respect to the requirement of a sealed instrument to convey lands must be the same, unless it has been changed by a local statute. The only doubtful question involved in this conclusion is the effect of the English Statute of Enrollment, upon the American law. It has been very generally held that this statute has never been recognized by the American courts as a part

¹ See 2 Washb. on Real Prop. 392, 394; 1 Spence Eq. Jur. 449, 450. The word "covenant" is also often used as synonymous with contract or agreement. Thus we speak of covenants in leases, when usually leases are not sealed.

² Williams on Real Prop. 147; 2 Bla. Com. 305, 306; 3 Hallam's Middle Ages, 329.

³ See *ante*, sect. 443, and *post*, sect. 800.

of the common law.¹ But the cases cited in the note only involved the question as to the necessity of an enrollment, and did not involve a discussion as to the applicability of the statute, so far as it requires a deed to create a use by bargain and sale. The natural presumption would be, that a statute could not be recognized in part, and denied to be in force as to its other requirements, particularly where the provision, supposed to be recognized, is only auxiliary to the main object and purpose of the statute. The conclusion, therefore, is, that *unless the Statute of Enrollment is in force in this country, or unless there is a State statute, requiring a use or trust to be created by deed in order that it may be executed by the Statute of Uses into a legal estate*, the ordinary deed in common use will be effectual to pass the legal title to any freehold in a corporeal hereditament, *without being sealed*, if an actual consideration is proved to have passed from the grantee to the grantor.² And, furthermore, if in any state the ordinary conveyance can operate as a feoffment, and the state statutes do not expressly require a sealed instrument, the conveyance will be a good feoffment without being sealed, and without the acknowledgment or proof of a consideration, if the conveyance expressly declares to whose use the lands shall be held.³

¹ Rogers v. Eagle Fire Ins. Co., 9 Wend. 611; Jackson v. Wood, 12 Johns. 74; Jackson v. Dunsbagh, 1 Johns. 97; Givan v. Doe, 7 Blackf. 210; Welch v. Foster, 12 Mass. 96; Report of Judges, 3 Binn. 156.

² The author has had neither time nor space to ascertain and state the exact law on this subject in any particular State. He has contented himself with the general statement of a somewhat abstract rule, and leaves the continuation of the investigation to the reader. One other observation may perhaps be necessary; and that is, that where a statute prescribes a form of conveyance, and requires a seal in executing it, it does not invalidate the other modes of conveyance, which were previously in use, unless they are expressly repealed (see *ante*, sect. 780); and the requirement of a seal in the statutory conveyance will not by implication make a seal necessary in the other forms of conveyance.

³ See sects. 443, 801.

CHAPTER XXII.

DEEDS — THEIR REQUISITES AND COMPONENT PARTS.

- SECTION I. *The requisites of a deed.*
 II. *The component parts of a deed.*
 III. *Covenants in deeds.*

SECTION I.

THE REQUISITES OF A DEED.

- SECTION 786. Definition of a deed.
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818. From what time does priority take effect?

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§ 786. **Definition of a deed.** — A deed, as defined by Lord Coke, is a writing *sealed* and *delivered* by the party thereto, and contains a contract, executory or executed. According to the common-law before the passage of the Statute of Frauds, signing was unnecessary. It is now, however, an important act, and in most, if not all, of the United States, it is absolutely necessary to the validity of the deed.¹ In discussing what constitutes a deed, its requisites will be considered first, and then the component parts in an orderly arrangement.

§ 787. **Requisites, what they are.** — The following may be stated as including all the essentials of a deed, viz.: (1) a sufficient writing; (2) proper parties, grantor and grantee; (3) a thing to be granted; (4) a consideration; (5) execution, *i.e.*, signing, sealing, attestation, and acknowledgment; (6) delivery and acceptance; (7) registration. These will be considered in their regular order.

§ 788. **A sufficient writing, what constitutes.** — Without meeting with any positive adjudication, it seems to be the accepted opinion of all the courts and treatise-writers that to make a valid deed it must be written on parchment or paper, it being supposed that these two materials are more durable, and less capable of erasure or alteration.² This objection goes more to the inadvisability of using other

¹ 3 Washb. on Real Prop. 239; Co. Lit. 171 b; Van Santwood v. Sandford, 12 Johns. 198; Hutchins v. Byrnes, 9 Gray, 367; Taylor v. Morton, 5 Dana, 365; Hammond v. Alexander, 1 Bibb, 333.

² 3 Washb. on Real Prop. 240; Co. Lit. 35 b; 2 Bla. Com. 297; Warren v. Lynch, 5 Johns. 240.

materials, from the individual standpoint of the parties, rather than to establish a ground for holding the deed to be otherwise invalid. There can be no objection in principle to a deed written on cloth or on unprepared skins of animals, as long as the writing remains unobliterated. And the reason fails altogether if the writing is carved on stone or engraved on metal. The writing must clearly manifest the intention of the parties, and contain the entire agreement. If any uncertainty, either as to the parties or the subject-matter, appears on the face of the deed, and cannot be explained away by a reference to other parts of the same deed, or by some other deed expressly referred to, parol evidence will not be admitted for that purpose, and the deed will be void for the want of certainty.¹ But it is not necessary to the validity of the deed that there should be a strict observance of the rules of grammar or rhetoric; as long as the intention and meaning of the parties can be gathered from the instrument, the law does not require accuracy or precision of language.²

§ 789. **A sufficient writing, what constitutes — Continued.** — But in order that a deed may be valid as a conveyance, the writing must be completed in all its essential parts before it is delivered. Any alteration or filling up of blanks after delivery will not give life to the deed.³ But though there is no variance among the decisions in respect to the correctness of this position, that the deed must be completed before it is delivered to the grantee in order to be valid, it is impossible to reconcile the authorities upon

¹ 3 Washb. on Real Prop. 266; *Boardman v. Reed*, 6 Pet. 345; *Deery v. Cray*, 10 Wall. 270; *Peck v. Mallams*, 10 N. Y. 630; *Andrews v. Todd*, 50 N. H. 565; *Hill v. Mowry*, 6 Gray, 551; *Fenwick v. Floyd*, 1 Har. & G. 172; *Thomas v. Turney*, *Ib.* 437.

² 3 Washb. on Real Prop. 240; *Shrewsbury's Case*, 9 Rep. 48; *Walters v. Bredin*, 70 Pa. St. 237.

³ 3 Washb. on Real Prop. 240; *Burns v. Lynde*, 6 Allen, 305; *Duncan v. Hodges*, 4 McCord, 239; *Perminter v. McDaniel*, 1 Hill (S. C.) 267.

the question, whether the delivery after its completion may not be made by an agent under a parol authority. In the early case of *Texira v. Evans*,¹ it was held that a bond which was signed by the obligor, but in which the sum was left blank, and was afterwards filled in by an agent and by him delivered to the obligee according to the parol authority of his principal, was good and binding upon the parties. This case has been often commented upon, and in the cases, cited in the note below, repudiated, and the contrary doctrine established that the deed must be completed before it leaves the hands of the grantor, or there must be a second delivery by him. An agent cannot deliver it, unless he obtains his authority from a power of attorney under seal.² On the other hand, the principle has been sustained by the courts of some of the States.³ The weight of authority in this country is certainly in favor of the position that a second delivery is necessary, although the better opinion would seem to be that the completion and delivery of the deed may be done by an agent as effectively as by the principal. This rule would give ample security to the grantor against any fraudulent transactions, while it would make the title of the grantee more secure.

§ 790. **Alterations and interlineations.** — It is also an important question how far alterations and interlineations

¹ 1 Anstr. 228.

² *Hibblewhite v. McMorine*, 6 Mees. & W. 200; *Davidson v. Cooper* 11 M. & W. 794; *Drury v. Foster*, 2 Wall. 24; *Burns v. Lynde*, 6 Allen, 305; *Basford v. Pearson*, 9 Allen, 388; *Vose v. Dolan*, 108 Mass. 159; *Chauncey v. Arnold*, 24 N. Y. 330; *Preston v. Hull*, 23 Gratt. 605; *Ingram v. Little*, 14 Ga. 174; *Gilbert v. Anthony*, 1 Yerg. 69; *Williams v. Crutcher*, 6 Miss. 71; *Viser v. Rice*, 33 Texas, 130; *Cross v. State Bank*, 5 Ark. 525; *Cummings v. Cassily*, 5 B. Mon. 74; *Conover v. Porter*, 14 Ohio, 450; *Simms v. Harvey*, 19 Iowa, 200; *People v. Organ*, 27 Ill. 29; *Mans v. Worthing*, 3 Ill. 26; *Upton v. Archer*, 41 Cal. 85.

³ *Inhabitants, etc., v. Huntress*, 53 Me. 90; *McDonald v. Eggleston*, 26 Vt. 161; *Wiley v. Moor*, 17 Serg. & R. 438; *Field v. Stagg*, 52 Mo. 534; *Van Etta v. Evanson*, 28 Wis. 33; *Devin v. Himer*, 29 Iowa, 301; *Owen v. Perry*, 25 Iowa, 412.

may be made in a deed without affecting its validity. Lord Goke states that in ancient times an erasure or interlineation would invalidate the deed at whatever time it was made.¹ But now, as it was even in the days of Coke, erasures and interlineations do not invalidate the deed. But in order that the deed may take effect as modified by the interlineation or erasure, the alteration must have been made before the delivery of the deed.² It is, however, doubtful upon whom the burden lies, to prove that the alteration was made before delivery. Where the alteration is in an unimportant part of the deed the question does not become important. But if the change is made in an essential part, some of the authorities treat the erasure or interlineation as extremely suspicious, and throw the burden of proof upon the grantee. The presumption of law, according to these authorities, is that it was made after the delivery.³ The courts of Massachusetts and other States deny that there is any presumption of law in respect to the matter, but hold that the burden of proof is thrown upon the party relying upon the deed.⁴ The following quotation from the court of Missouri may, perhaps, furnish the correct rule: "As a general rule, if any presumption at all is indulged, the law will presume that the alteration was made before, or at least contemporaneous with, the signing of the writing, unless peculiar circumstances are patent upon its face; and even then the whole question is one for the jury to settle upon the facts, when and where, and with what intent, the alteration was

¹ Co. Lit. 225 b.

² 3 Washb. on Real Prop. 244; *Jordan v. Stevens*, 51 Me. 78; *Bassett v. Bassett*, 55 Me. 126; *Gordon v. Sizer*, 39 Miss. 818.

³ *United States v. Linn*, 1 How. 104; *Hill v. Barnes*, 11 N. H. 395; *Dow v. Jewell*, 18 N. H. 356; *Clifford v. Parker*, 2 Mann. & G. 909; *Morris v. Vanderen*, 1 Dall. 67; 1 Greenl. on Ev., sect. 564; *Galland v. Jackman*, 26 Cal. 85.

⁴ *Ely v. Ely*, 6 Gray, 439; *Wilde v. Armsby*, 6 Cush. 314; *Knight v. Clements*, 8 A. & E. 215; *Beaman v. Russell*, 20 Vt. 205; *Jackson v. Osborn*, 2 Wend. 555; *Herrick v. Malin*, 22 Wend. 388; *Comstock v. Smith*, 26 Mich. 306.

made.”¹ The safer plan, and the one adopted by all careful conveyancers, when alterations in the body of the deed are necessary, is to note the erasure or interlineation upon the instrument, and generally above the attestation clause, to show that it was made before the delivery. But no subsequent alteration of the deed, not even its destruction, can have any effect upon the title which has been passed by the deed,² although it would be fatal to any action upon the covenants in the deed if the deed is fraudulently destroyed or a material alteration is made in the covenant.³ But if a deed is destroyed without the fault of the grantee, he may resort to equity to compel the grantor to give him a new deed,⁴ or the contents may be proved by parol evidence, after the loss of the deed has been established.⁵

§ 791. **Proper parties — The grantor.** — It needs only to be stated, to receive immediate recognition, that to make a valid deed there must be a competent grantor. He must own the property, and have the capacity to convey. The number of persons who are in this respect under disability is very small, and may all be included in the classes known as infants, *non compotes mentis*, and married women. The disabilities resting upon these persons are not uniform in their extent, and vary in reference to each class. In respect to some the deeds are absolutely void, while as to others they are only voidable. They will be discussed separately.

¹ McCormick v. Fitzmorris, 39 Mo. 34; Matthews v. Coalter, 9 Mo. 705.

² Davis v. Cooper, 11 Mees. & W. 800; Bolton v. Carlisle, 2 H. Bl. 263; Roe v. York, 6 East, 86; Hatch v. Hatch, 9 Mass. 367; Dana v. Newhall, 13 Mass. 498; Chessman v. Whittemore, 23 Pick. 231; Lewis v. Payn, 8 Cow. 71; Nicholson v. Halsey, 1 Johns. Ch. 417; Jackson v. Chase, 2 Johns. 84; Raynor v. Wilson, 6 Hill, 469; Rifener v. Bowman, 53 Pa. St. 318; Fletcher v. Mansur, 5 Ind. 267; Wood v. Hilderbrand, 46 Mo. 284.

³ Davidson v. Cooper, 11 Mees. & W. 800; Deems v. Philips, 5 W. Va. 168; Woods v. Hilderband, 46 Mo. 284.

⁴ King v. Gilson, 32 Ill. 354.

⁵ Wallace v. Harmstad, 44 Pa. St. 492; Shaumberg v. Wright, 39 Mo. 125.

§ 792. **Infants and insane persons.** — As a general proposition, it may be stated that the deeds of infants and lunatics are placed in respect to their validity on the same basis, and are held to be voidable and not void.¹ But if the insane person is under guardianship, the deed will be absolutely void;² while in New York and Pennsylvania the deed of an insane person seems under all circumstances to be void.³ But it is often difficult to determine what degree of sanity is sufficient to enable a person to make a good and valid deed. The question is no doubt one of fact, whether the person has sufficient strength of mind to understand the nature and consequences of the act of conveyance. The fact that his mental powers have been impaired will not invalidate the deed, provided they have not been so far affected as to make him incapable to transact business, and to protect his interests to a reasonable degree.⁴ But deeds of both infants and lunatics may be made valid by a subsequent ratification; in the case of infants after coming of age, and with lunatics after the mental disturbance has passed away. In order to avoid a deed made by an infant or insane person, it will not be necessary to restore the

¹ 2 Kent's Com. 236; 3 Washb. on Real Prop. 249, 250; Williams on Real Prop. 66; 2 Bla. Com. 291; Zouch v. Parsons, 3 Burr. 1794; Tucker v. Moreland, 10 Pet. 58; Irvine v. Irvine, 9 Wall. 626; Hovey v. Hobson, 53 Me. 451; Kendall v. Lawrence, 22 Pick. 540; Wait v. Maxwell, 5 Pick. 217; Arnold v. Richmond Iron Works, 1 Gray, 434; Howe v. Howe, 99 Mass. 98; Roof v. Stafford, 7 Cow. 180; Kline v. Beebe, 6 Conn. 494; Richardson v. Boright, 9 Vt. 368; Eaton v. Eaton, 37 N. J. L. 507; Wallace v. Lewis, 4 Harr. 75; Doe v. Abernathy, 7 Blackf. 442; Babcock v. Bowman, 8 Ind. 110; Miller v. Lingerian, 24 Ind. 387; Breckenridge v. Ormsby, 1 J. J. Marsh. 245; Phillips v. Green, 3 A. K. Marsh. 11; Myers v. Sanders, 7 Dana, 524.

² Wait v. Maxwell, 5 Pick. 217; Griswold v. Butler, 3 Conn. 231; Pearl v. McDowell, 3 J. J. Marsh. 658.

³ Van Deusen v. Sweet, 51 N. Y. 384; Matter of Desilver, 5 Rawle. 111. But see Roof v. Stafford, 7 Cow. 180; Bool v. Mix, 17 Wend. 119; Ingraham v. Baldwin, 9 N. Y. 45.

⁴ Dennett v. Dennett, 44 N. H. 538; Doe v. Prettyman, 1 Houst. 339.

consideration.¹ An infant cannot avoid his deed while he is an infant, and a second deed during infancy is no disaffirmance of the first.²

§ 793. **Ratification and disaffirmance.**—What constitutes a ratification or a disaffirmance is, perhaps, not easy of solution. It is not necessary that the act of ratification should be as formal as the ordinary release of an outstanding claim of title; but, on the other hand, the act or acts, from which the ratification may be inferred, must be a sufficiently strong admission of the title of the grantee to give rise to the presumption, that the *quondam* infant or lunatic intends to ratify his deed.³ The acceptance of a lease, an oral acknowledgment of the validity of the conveyance, the subsequent acceptance of the consideration, provided these acts are done intelligently, will be a sufficient ratification.⁴ So, on the other hand, an entry, the institution of a suit, a subsequent conveyance, are sufficient acts of disaffirmance to avoid the deed, and no subsequent ratification of the first deed can invalidate the title of the grantee in the second conveyance, if the second deed is recorded.⁵ So far the courts are agreed. But whether a mere silent acquiescence will operate as a ratification is a disputed point. A number of the courts hold that, in order to avoid a deed made under disability, it must be disaffirmed within a reasonable time after the removal of the disability, and that if the grantee is suf-

¹ 2 Kent's Com. 236; *Hovey v. Hobson*, 53 Me. 453; *Gibson v. Soper*, 6 Gray, 279; *Richardson v. Boright*, 9 Vt. 368; *Wallace v. Lewis*, 4 Harr. 75; *Cresinger v. Welch*, 15 Ohio, 156; *Babcock v. Bowman*, 8 Ind. 110.

² 3 Washb. on Real Prop. 250; *Emmons v. Murray*, 16 N. H. 385.

³ *Howe v. Howe*, 99 Mass. 98.

⁴ *Irvine v. Irvine*, 9 Wall. 618; *Bond v. Bond*, 7 Allen, 1; *Ferguson v. Bell*, 17 Mo. 347.

⁵ *Tucker v. Moreland*, 10 Pet. 75; *Bond v. Bond*, 7 Allen, 1; *Jackson v. Carpenter*, 11 Johns. 541; *Jackson v. Burchin*, 14 Johns. 124; *Drake v. Ramsey*, 5 Ohio, 253; *Black v. Hills*, 36 Ill. 379.

ered to remain in possession for a long time, particularly if he makes valuable improvements upon the premises, the deed will be ratified, and the grantee's title made good.¹ But the position is not sustained by the other courts, which maintain that mere acquiescence will not operate as a ratification, unless it has been so long continued as to bar the right of action under the Statute of Limitations.²

§ 794. **Deeds of married women.** — It may be stated as a general proposition that the deeds of married women, unless they are also executed by their husbands, or unless it is otherwise provided by statute, are absolutely void; and if, after becoming *discoverd*, a second conveyance, or a second delivery of the same deed, is made, the deed takes effect as a primary conveyance from the time of the second delivery, and not as a secondary conveyance confirmatory of the prior conveyance during coverture.³ Reference is not made here to her sole and separate property. This species of property is an equitable estate governed by the rules of the law of uses and trusts; this branch of the subject has been already discussed, and the powers of married women in relation thereto explained.⁴ But in a number of the United States statutes have been enacted abolishing the entire common law in relation to the property rights of married women, and giving them the rights and capacity of

¹ *Robins v. Eaton*, 10 N. H. 561; *Emmons v. Murray*, 16 N. H. 385; *Jackson v. Carpenter*, 11 Johns. 539; *Bostwick v. Atkins*, 3 N. Y. 58; *Kline v. Beebe*, 6 Conn. 506; *Richardson v. Boright*, 9 Vt. 371; *Wallace v. Lewis*, 4 Harr. 75; *Wheaton v. East*, 5 Yerg. 41; *Hartman v. Kendal*, 4 Ind. 403.

² *Irvine v. Irvine*, 9 Wall. 618; *Hovey v. Hobson*, 53 Me. 453; *Drake v. Ramsey*, 5 Ohio, 253; *Cresinger v. Welch*, 15 Ohio, 156.

³ *Zouch v. Parsons*, 3 Burr. 1805; *Allen v. Hooper*, 50 Me. 374; *Hatch v. Bates*, 54 Me. 139; *Lowell v. Daniels*, 2 Gray, 161; *Concord Bank v. Bellis*, 10 Cush. 277; *Dow v. Jewell*, 18 N. H. 355; *Davis v. Andrews*, 30 Vt. 681; *Perrine v. Perrine*, 11 N. J. Eq. 144; *Harris v. Burdock*, 4 Harr. 66; *Lefevre v. Murdock*, Wright, 205; *Baxter v. Bodkin*, 25 Ind. 172; *Bressler v. Kent*, 61 Ill. 426; *Cope v. Meeks*, 3 Head, 388; *Goodright v. Straphan*, Cowp. 201.

⁴ See *ante*, sect. 469.

singlewomen.¹ In Massachusetts the separate deed of a married woman will be good for every other purpose except to convey the husband's right of curtesy therein.² And perhaps it may be doubtful in some of the other States, where statutes of this character have been passed, whether it is not still necessary for the husband to join in the execution of the deed, in order to bar his right of curtesy. In New York the husband's curtesy is barred by the separate conveyance of the wife.³ At common law the only mode of conveying the wife's property was by levying a fine.⁴ Subsequently, by statute, 3 & 4 Wm. IV., ch. 74, a joint conveyance of husband and wife, when properly acknowledged, was made sufficient to convey her estate, thus doing away with the necessity of the fine.⁵ And still later, in 1874, by statute 37 & 38 Vict., ch. 78, when any estate shall be vested in a married woman as a bare trustee, she may convey it as freely as if she were a *feme sole*.⁶ But in this country fines and recoveries were never recognized as modes of conveying the interests of married women, and instead thereof it has from the early colonial days become customary in the United States for married women to convey their real estate by deed, in which their husbands joined. This custom has been generally recognized wherever the common-law disability still prevails, and has been adopted as law and incorporated into the statutes of the different States.⁷ In some of the States certain forms of conveyance and

¹ See *ante*, sect. 94.

² *Beal v. Warren*, 2 Gray, 458; *Willard v. Eastham*, 15 Gray, 334; *Campbell v. Bemis*, 16 Gray, 487.

³ *Yale v. Dederer*, 22 N. Y. 460; *Hatfield v. Sneden*, 54 N. Y. 287.

⁴ 3 Washb. on Real Prop. 252; *Williams on Real Prop.* 229, 230.

⁵ *Williams on Real Prop.* 230.

⁶ *Williams on Real Prop.* 232.

⁷ *Fowler v. Shearer*, 7 Mass. 14; *Lithgow v. Kavanagh*, 9 Mass. 161; *Gordon v. Haywood*, 2 N. H. 402; *Jackson v. Gilchrist*, 15 Johns. 110; *Davey v. Turner*, 1 Dall. 11; *Lloyd's Lessees v. Taylor*, 1 Dall. 17; 3 Washb. on Real Prop. 252; *Williams on Real Prop.* 231, Rawle's note; 4 Kent's Com. 152, 154.

modes of execution are prescribed by statute, and in those States a strict compliance with the requirements of the statute is necessary; if it is not executed according to the statute the conveyance will be void.¹ In some of the States it is required that she be examined privately by an officer authorized to take oaths, and the deed acknowledged by her as her free act and deed, and she is generally required to state further, that her husband has not by any means of intimidation prevailed upon her to execute it against her will.² In the New England States, and some others, a privy examination is not required, a simple acknowledgment being sufficient, and in some of the States the joint conveyance may be made by separate deeds.³ It is also generally necessary that the deed, in order to pass the wife's property, must contain words of grant which expressly or impliedly refer to her, and proceed from her. Merely signing a deed, in which the husband is represented as conveying his right or interest in the property, will not make it her deed. She must be joined with him in the operative words of the deed.⁴ But generally there will be a sufficient joining of the hus-

¹ *Hepburn v. Dubois*, 12 Pet. 375; *Elwood v. Black*, 13 Barb. 50; *Askew v. Daniel*, 5 Ired. Eq. 321; *Reaume v. Chambers*, 22 Mo. 36; *Mariner v. Saunders*, 10 Ill. 113; *Garrett v. Moss*, 22 Ill. 363; *Morrison v. Wilson*, 13 Cal. 498.

² *Albany Fire Ins. Co. v. Bay*, 4 N. Y. 9; *Dundas v. Hitchcock*, 12 How. 256; *Elliott v. Pearce*, 20 Ark. 508; *Askew v. Daniel*, 5 Ired. Eq. 321; *Doe v. Fridge*, 3 McLean, 245; *Applegate v. Gracy*, 9 Dana, 214; *Scott v. Purcell*, 7 Blackf. 66; *Barton v. Morris*, 5 Ohio, 408; *Garrett v. Moss*, 22 Ill. 363; *Lyon v. Kain*, 36 Ill. 370; *Bours v. Zachariah*, 11 Cal. 281; *Sanders v. Bolton*, 26 Cal. 408; 8 Washb. on Real Prop. 255, 256.

³ 4 Greenl. Cruise, 19, note; 3 Washb. on Real Prop. 254, 255; 2 Kent's Com. 150-154; *Shepherd v. Howard*, 2 N. H. 507; *Lawyer v. Slingerland*, 11 Minn. 458.

⁴ *Agricultural Bank v. Rice*, 4 How. 225; *Dundas v. Hitchcock*, 12 How. 256; *Lithgow v. Kavanagh*, 9 Mass. 173; *Lufkin v. Curtis*, 13 Mass. 223; *Dodge v. Nichols*, 5 Allen, 548; *Raymond v. Holden*, 2 Cush. 264; *Melvin v. Prop'rs of Locks and Canals*, 16 Pick. 137; *Learned v. Cutler*, 18 Pick. 9; *Frost v. Deering*, 21 Me. 156; *Whiting v. Stevens*, 4 Conn. 44; *Cincinnati v. Newhall*, 7 Ohio St. 37; *Purcell v. Goshorn*, 17 Ohio, 105; *Cox v. Wells*, 7 Blackf. 410; *Stearns v. Swift*, 8 Pick. 532.

band in the deed if he signs it. It is not necessary for him to be mentioned in the deed as one of the grantors.¹ And where both are mentioned as grantors the deed may be made to convey not only her property, but also his independent interests in the same.² In several of the States it is provided by statute that a married woman will have the powers and capacity of single women, if her husband has deserted her, or has been consigned to prison, or has become incapable of executing deeds from any other cause.³ It is impossible to present within any narrow compass the details of the law in respect to property rights of married women, as it prevails in the different States. Reference must be had to the statutes and decisions of the State in which the question arises.

§ 795. **A disseisee cannot convey.** — Another requisite under the head of competent grantors is, that the grantor is seised at the time of the conveyance. If the land is in the adverse possession of another, disseisin leaving nothing in him but a *chose in action*, the grantor is prohibited at common law from conveying this interest. This prohibition has been retained in a number of the States, to which reference is made in the cases cited below.⁴ It has also been held that

¹ *Hills v. Bearse*, 9 Allen, 406; *Elliott v. Sleeper*, 2 N. H. 525; *Woodward v. Seaver*, 38 N. H. 29; *Stone v. Montgomery*, 35 Miss. 83; *Ingoldsby v. Juan*, 12 Cal. 564.

² *Needham v. Judson*, 101 Mass. 161.

³ 4 Greenl. Cruise, 19, 20; *Gregory v. Pierce*, 4 Metc. 478; *Abbott v. Bayley*, 6 Pick. 89; *Boyce v. Owens*, 1 Hill (S. C.) 8.

⁴ *Hathorne v. Haines*, 1 Me. 238; *Foxcroft v. Barnes*, 29 Mich. 128; *Parker v. Prop'rs*, etc., 3 Metc. 98; *Wade v. Lindsey*, 6 Metc. 407; *Sohier v. Coffin*, 101 Mass. 179; *Park v. Pratt*, 38 Vt. 563; *White v. Fuller*, 38 Vt. 204; *Dame v. Wingate*, 12 N. H. 291; *Thurman v. Cameron*, 24 Wend. 87; *Den v. Shearer*, 1 Murph. 114; *Hoyle v. Logan*, 4 Dev. 494; *Gresham v. Webb*, 29 Ga. 320; *Helms v. May*, 29 Ga. 124; *Jones v. Monroe*, 32 Ga. 188; *Betsey v. Torrance*, 34 Miss. 132; *Ewing v. Savary*, 4 Bibb, 424; *Webb v. Thompson*, 23 Ind. 432; *German Ins. Co. v. Grim*, 32 Ind. 257; *Stockton v. Williams*, 1 Dougl. (Mich.) 546; *Granger v. Swart*, 1 Woolw. C. C. 91.

the disseisin of a mortgagor will invalidate the mortgage and the assignment of it by the mortgagee.¹ But the deed is only void against the parties in adverse possession at the time of the conveyance. As against the rest of the world and between the parties to the deed, it is good.² And although the legal title, as against the disseisor, remains in the grantor unaffected by the grant, the grantee acquires such an interest in the land as will enable him to claim the land against the grantor, and maintain his action of ejectment against the disseisor in the name of the grantor.³ But it is always competent for the grantor to make a good conveyance of lands in the adverse possession of another by entering upon the land and delivering the deed there. His entry restores the seisin to him for the time being, and interrupts the continuity of the adverse possession.⁴ This doctrine does not apply to incorporeal hereditaments, nor to such adverse possession of strips of land arising from a mistake as to the boundaries.⁵ And since a State cannot be disseised, no adverse possession will invalidate its deed of conveyance.⁶ These principles prevail generally in this country, but in some of the States the entire doctrine has been re-

¹ *Williams v. Baker*, 49 Me. 428.

² *Wade v. Lindsey*, 6 Metc. 407; *Farmer v. Peterson*, 111 Mass. 151; *Edwards v. Roys*, 18 Vt. 473; *White v. Fuller*, 38 Vt. 204; *Park v. Pratt*, 38 Vt. 553; *Livingston v. Prosens*, 2 Hill, 526; *Livingston v. Peru Iron Co.*, 9 Wend. 511; *Stockton v. Williams*, 1 Dougl. (Mich.) 546; *Betsey v. Torrance*, 34 Miss. 138.

³ *Brinley v. Whiting*, 5 Pick. 348; *Sohier v. Coffin*, 101 Mass. 179; *Wade v. Lindsey*, 6 Metc. 413; *Jackson v. Leggett*, 7 Wend. 380; *Livingston v. Peru Iron Co.*, 9 Wend. 523; *Edwards v. Parkhurst*, 21 Vt. 472; *Wilson v. Nance*, 11 Humph. 191; *Kincaid v. Meadows*, 3 Head, 192; *Betsey v. Torrance*, 34 Miss. 138; *Stockton v. Williams*, 1 Dougl. (Mich.) 546; *Shortall v. Hinckley*, 31 Ill. 219.

⁴ *Farwell v. Rogers*, 99 Mass. 36; *Warner v. Bull*, 13 Metc. 4.

⁵ *Corning v. Troy Iron Factory*, 40 N. Y. 191; *Cleveland v. Flagg*, 4 Cush. 76; *Sparhawk v. Bogg*, 16 Gray, 585.

⁶ *Ward v. Bartholomew*, 6 Pick. 409; *People v. Mayer, etc.*, 28 Barb. 240.

pudiated, and it is there held that disseisin does not in any way affect the capacity of the grantor to convey.¹

§ 796. **Fraud and duress.** — Not only must there be a grantor capable of making a conveyance, but the deed must be a free and voluntary act. If, therefore, he is induced by fraud, or forced by threats of personal injury, to make a conveyance which he would not otherwise have made, the deed is voidable. By restoring the consideration he may, within a reasonable time after the discovery of the fraud, or after he is removed from the threatened danger, disaffirm the deed, and recover the land.² What will constitute such a duress as to avoid a deed made while under its influence, is a question which is determined by the facts of each case. It must be such a duress as will seriously interfere with, or take away, the will power of the grantor. According to the United States Court, “unlawful duress is a good defence if it includes such a degree of constraint or danger, either actually inflicted or threatened and impending, as is sufficient in severity or apprehension to overcome the mind and will of a person of ordinary firmness.”³ In New Hampshire it was held necessary that the duress must raise the apprehension of loss of life, limb or personal liberty;⁴ while it has been held sufficient duress that a wife signed under threats of abandonment by the husband, and in another case under a threat of criminal prosecution against her husband.⁵ Perhaps no better rule can be laid down than that which is

¹ *Cresson v. Miller*, 2 Watts, 272; *Poyas v. Wilkins*, 12 Rich. 420; *Bennett v. Williams*, 5 Ohio, 461; *Shortall v. Hinckley*, 31 Ill. 219; *Fetrow v. Merriweather*, 53 Ill. 279; *Stewart v. McSweeney*, 14 Wis. 471; *Crane v. Reeder*, 21 Mich. 82.

² 2 Bla. Com. 291; 3 Washb. on Real Prop. 260; *Worcester v. Eaton*, 13 Mass. 371; *Bassett v. Brown*, 105 Mass. 551; *Fisk v. Stubbs*, 30 Ala. 335; *Deputy v. Stapleford*, 19 Cal. 302.

³ *United States v. Huckabee*, 16 Wall. 423.

⁴ *Evans v. Gale*, 18 N. H. 401.

⁵ *Eddie v. Slimmons*, 26 N. Y. 12; *Topley v. Topley*, 10 Minn. 460.

taken from the United States Supreme Court, regard being had, in its application to particular cases, to the age, condition and sex of the parties.

§ 797. **Proper parties — Grantees.** — All persons, as a general rule, are able to take property as grantees, infants, persons *non compotes mentis*, married women, corporations, etc.¹ But from the necessity of the case, if these conveyances are coupled with a condition imposing duties upon the grantee, or contain covenants of the grantee, the grantee under disability cannot be compelled to perform them. And if in consequence of his failure to perform the conveyance may be avoided, the grantor's only remedy is to recover the land. But in respect to married women, it seems that the assent of the husband is necessary at common law to make the conveyance to the wife valid. The deed is otherwise void. And if he assents to the conveyance neither she nor her heirs can disaffirm the deed after his death.² Lord Coke maintains that the assent of the husband does not prevent a disclaimer by the wife after his death.³ The statutes of *mortmain* in England prohibit corporations from taking lands by purchase, unless specially authorized. But these statutes have never prevailed in this country, except in Pennsylvania, and, therefore, corporations are free to purchase lands to any amount, unless specially restrained by their charters, or by the general laws under which the incorporation was obtained. It is customary, however, to limit the amount of real property which a corporation may hold, and the State may confiscate whatever lands it ac-

¹ 3 Washb. on Real Prop. 267; Sutton v. Cole, 3 Pick. 332; Melvin v. Prop'rs, etc., 16 Pick. 167; Concord Bank v. Bellis, 10 Cush. 278; Peavey v. Tilton, 18 N. H. 152; Spencer v. Carr, 45 N. Y. 410; Mitchell v. Ryan, 3 Ohio St. 387; Rivard v. Walker, 39 Ill. 413; Cecil v. Beaver, 23 Iowa, 241.

² Co. Lit. 3 a; Butler v. Baker, 3 Rep. 26; Whelpdale's Case, 5 Rep. 119; Melvin v. Prop'rs, etc., 16 Pick. 167; Foley v. Howard, 8 Clarke, 36.

³ Co. Lit. 3 a.

quires above the limit. But if the land exceeds the limit in consequence of the rise in value, it will not be subject to forfeiture.¹ For the grant of an immediate estate in possession, it is necessary that the grantee be *in esse*, and if it be shown that the grantee came into being after the conveyance, it will avoid the deed.² But this is not necessary in the grant of remainders and future contingent estates.³

§ 798. **Proper parties named in the deed.** — Not only must there be proper parties, grantor and grantee, but they must be named in the deed. Names are necessary to distinguish the parties, and render certain who are the grantor and grantee. The object, therefore, is attained if any name is used, not necessarily the true name, provided means are provided in the deed for ascertaining the true parties. A man may be described by his office or by his relation to a certain person.⁴ And a mistake in the Christian name or the use of different names in different parts of the deed is not fatal, provided the uncertainty arising therefrom is not incurable. If the true party can be ascertained, the deed will be good.⁵ A deed to a fictitious person, or to one by his surname only, without further means of identifying the

¹ 3 Washb. on Real Prop. 267; *Bogardus v. Trinity Church*, 4 Sandf. Ch. 633. In this case the property, when acquired by the corporation, yielded an income of £30, and by the remarkable rise in the value of real estate in the city of New York the income was increased to \$300,000.

² 3 Washb. on Real Prop. 266; *Hulick v. Scovil*, 4 Ill. 191; *Miller v. Chittenden*, 2 Iowa, 368.

³ *Hall v. Leonard*, 1 Pick. 27; *Morris v. Stephens*, 46 Pa. St. 200; *Huss v. Stephens*, 51 Pa. St. 282; 3 Washb. on Real Prop. 266, 267.

⁴ A grant to the heirs of A., A. being dead, is good, for it is possible to ascertain who are the heirs of A. *Hogan v. Page*, 2 Wall. 607; *Ready v. Kearsley*, 14 Mich. 225; *Cook v. Sinnamon*, 47 Ill. 214; *Boone v. Moore*, 14 Mo. 420. A grant to A. and his partners has also been held good. *Hoffman v. Porter*, 2 Brock. 156; *Morse v. Carpenter*, 19 Vt. 613. *Contra*, *Arthur v. Weston*, 22 Mo. 378. See also, generally, *Dr. Ayray's Case*, 11 Rep. 20; *Sir Moyle Finch's Case*, 6 Rep. 65; *Shaw v. Loud*, 12 Mass. 447.

⁵ *Boothroyd v. Engles*, 23 Mich. 21; *Tostin v. Faught*, 23 Cal. 237; *Middleton v. Findla*, 25 Cal. 80.

person intended, would be void for uncertainty.¹ But it has been held that where the Christian name is left blank, the grantee, being in possession of the deed, may show by parol evidence that he was the person intended.² The law knows only one Christian name. The omission of the middle name is, therefore, not material; neither is a mistake in calling the party *senior*, when he is the *junior* of that name.³ In the same manner a mistake in the Christian name may be explained by a reference to the other parts of the deed.⁴ There is the same necessity of naming in the deed the person who is to take the equitable interest under it as to name the grantee of the legal estate.⁵ And if a grant is made to trustees of an unincorporated corporation, the persons named as trustees take individually and not as trustees.⁶ And where there is a person named in the deed as the grantee of the immediate estate, the remainder-man under the deed need not be made a party to the deed, although he must be named or sufficiently described.⁷ Finally, in order that a deed may be valid, there must be a definite deed, an ascertained grantor and grantee, and if there is an incurable uncertainty as to either, arising from the terms of the deed, it will be void.⁸

§ 799. **A thing to be granted.** — In order that there may be a conveyance, there must be a thing to be conveyed, and

¹ Fanshaw's Case, F. Moore, 229; Jackson v. Corey, 8 Johns. 388; Hornbeck v. Westbrook, 9 Johns. 74; Muskingum Turnpike v. Ward, 13 Ohio, 120.

² Fletcher v. Mansur, 5 Ind. 269. See Morse v. Carpenter, 19 Vt. 615.

³ Games v. Stiles, 14 Pet. 322; Dunn v. Games, 1 McLean, 321; Franklin v. Tallmadge, 5 Johns. 84.

⁴ 3 Washb. on Real Prop. 265.

⁵ German Ass'n v. Scholler, 10 Minn. 331. See *ante*, sect. 445 and *post*, sects. 883, 884.

⁶ Austin v. Shaw, 10 Allen, 552; Brown v. Combs, 29 N. J. L. 36; Tower v. Hale, 46 Barb. 361; Den v. Hay, 21 N. J. L. 174. See *post*, sects. 883, 884, in reference to the devises to unincorporated bodies.

⁷ Hornbeck v. Westbrook, 9 Johns. 73; Hunter v. Watson, 12 Cal. 363.

⁸ Jackson v. Corey, 8 Johns. 388; Hornbeck v. Westbrook, 9 Johns. 74.

this must be sufficiently described in the deed, so as to be capable of easy identification.¹ It may now be stated as a general rule, subject to a few exceptions to be mentioned hereafter, that every freehold interest in, or issuing out of, lands must and can only be conveyed by deed.² And whatever is created by deed, can only be transferred by deed.³ Not only must estates in the land itself be conveyed by deed, but incorporeal hereditaments of a freehold character, Easements, *profits à prendre*, the mines and other deposits upon the land apart from the soil, all require a deed to be granted.⁴ It has been a much debated question whether, to pass the title to growing or standing trees, it is necessary that the sale should be made by writing. Some authorities hold, notably the English courts, that if the sale contemplates the immediate removal of the trees, it is not necessary that it should be done by deed or other instrument in writing, since it can and ought to be considered a sale of chattels rather than an interest in the freehold.⁵ On the other hand,

¹ See *post*, sects. 827–841, for a discussion of the usual elements of a description of the land, and for what is a sufficient description.

² 3 Washb. on Real Prop. 341. Mr. Washburn, on the page referred to, says that “since the Statute of Frauds (29 Charles II. ch. 3), a deed has been required, in order to convey a freehold, in, to, or out of any messuages, manors, lands, tenements, or hereditaments.” The Statute of Frauds only requires such conveyances to be put in writing, and does not require a deed. When this section (799) was written, the author had entertained the generally prevailing idea that a deed, *i.e.*, an instrument in writing under seal, was necessary to convey all freehold interests in lands, and had not yet written section 783, in which the contrary position, with qualifications, has been assumed. Inasmuch as a deed is necessary in the conveyance of very many freehold interests — for example, incorporeal hereditaments — the present section has not been altered; but the statements made there and elsewhere must be read in the light of section 783.

³ 3 Washb. on Real Prop. 341.

⁴ 3 Washb. on Real Prop. 341. See *ante*, sect. 783.

⁵ *Smith v. Surman*, 9 B. & C. 561; *Evans v. Roberts*, 5 B. & C. 829; *Marshall v. Green*, 33 L. T. Rep. (N. S.) 404; *Bostwick v. Leach*, 3 Day, 476. But in *Rodwell v. Phillips*, 9 Mees. & W. 505, *contra*, the court say: “It must be admitted, taking the cases altogether, that no general rule is laid down in any one of them that is not contradicted by some other.”

the courts of this country generally hold that standing trees are "a part of the inheritance, and can only become personalty by actual severance, or by severance in contemplation of law as the effect of a proper instrument in writing."¹ A sale of standing trees is a twofold contract. It includes a sale of trees when severed from the land, which must necessarily be executory in its character, and a license to go upon the land and remove them. Until a severance has been made, the only vested interest which the vendee has is the license, and it being an interest in land, it is revocable unless granted by a proper instrument of conveyance. Where the license is of a definite duration, it being then a leasehold interest in the land, a deed strictly so-called will not be necessary. But if it is indefinite, it becomes a freehold interest in lands, and requires a deed to grant it.² Standing trees and other things growing upon the land certainly pass with the conveyance of the freehold, unless expressly excepted.³ If, therefore, a sale is made of standing trees with a parol license to enter and cut them, it does not prevent the title to the trees from passing to a subsequent grantee; the license by such subsequent conveyance is revoked, and the licensee is left to his remedy against his

Slocum v. Seymour, 36 N. J. 139; *Trull v. Fuller*, 28 Me. 548; *Green v. Armstrong*, 1 Denio, 550; *McGregor v. Brown*, 10 N. Y. 117; *Vorebeck v. Roe*, 50 Barb. 305; *Claffin v. Carpenter*, 4 Metc. 580; *Parsons v. Smith*, 5 Allen, 580; *Giles v. Simonds*, 15 Gray, 441; *Delaney v. Root*, 99 Mass. 548; *Poor v. Oakman*, 104 Mass. 316; *White v. Foster*, 102 Mass. 378; *Buck v. Pickwell*, 27 Vt. 164.

² *Clap v. Draper*, 4 Mass. 266; *Green v. Armstrong*, 1 Denio, 554; *Kingsley v. Holbrook*, 45 N. H. 313; *Howe v. Batchelder*, 49 N. H. 208; *Sterling v. Baldwin*, 42 Vt. 308; *Huff v. McCauley*, 58 Pa. St. 210; *Pattison's Appeal*, 61 Pa. St. 297.

³ *Bracket v. Goddard*, 54 Me. 313; *Noble v. Bosworth*, 19 Pick. 314; *Mott v. Palmer*, 1 N. Y. 564; *Goodrich v. Jones*, 2 Hill, 142; *Terhaw v. Ebberson*, 1 Pa. St. 726; *Cook v. Whiting*, 16 Ill. 481. But Chancellor Kent maintains that growing crops do not pass with the grant of the land. 4 Kent's Com. 468; *Smith v. Johnston*, 1 Pa. St. 471. See *Foote v. Colvin*, 3 Johns. 216; *Kittredge v. Wood*, 3 N. H. 503; *Turner v. Reynolds*, 23 Pa. St. 199; *Chapman v. Long*, 10 Ind. 465; *McIlvaine v. Harris*, 20 Mo. 467.

licenser for the breach of his executory contract.¹ Some of the courts are also inclined to treat the sale of annual crops as the sale of chattels instead of an interest in lands. This is undoubtedly the correct theory, qualified, however, by the statement that the sale must be evidenced by some writing, in order to give to the vendee any vested interest during the growth of the crop. But since the license is only for a year, or less than a year, any writing will suffice.²

§ 800. **A thing to be granted — Continued.** — **A mere possibility.** — A further qualification of the above stated general rule is, that there cannot be a grant of a mere possibility, unless coupled with a vested interest. It must be a vested present future estate.³ But this rule is not now enforced so rigidly as formerly. Thus, the deed of an heir apparent conveying his ancestor's estates has been held to attach in equity to the estate upon the death of the ancestor.⁴ Also a grant by a soldier of bounty lands to be thereafterwards given to him by the government.⁵ And a further modification is attained by the application of the doctrine of estoppel arising on a covenant of title in the deed.⁶

§ 801. **The consideration.** — It is sometimes stated as a general proposition that a consideration, good or valuable,

¹ *Whitmarsh v. Walker*, 1 Metc. 313; *Giles v. Simonds*, 15 Gray, 441.

² *Crosby v. Wadsworth*, 6 East, 602; *Waddington v. Bristow*, 2 B. & P. 452; *Warwick v. Bruce*, 2 M. & S. 205; *Evans v. Roberts*, 5 B. & C. 836; *Whipple v. Foote*, 2 Johns. 418; *Stewart v. Doughty*, 9 Johns. 108; *Austin v. Sawyer*, 9 Cow. 40; *Green v. Armstrong*, 1 Denio, 554; *Powell v. Rich*, 31 Ill. 469; *Graff v. Fitch*, 58 Ill. 377.

³ *Fulwood's Case*, 4 Rep. 66; *Davis v. Hayden*, 9 Mass. 519; *Trull v. Eastman*, 3 Metc. 121; *Jackson v. Catlin*, 2 Johns. 261; *Dart v. Dart*, 7 Conn. 255; *Bayler v. Commonwealth*, 40 Pa. St. 37; 3 Washb. on Real Prop. 348.

⁴ *Stover v. Eycleshimer*, 46 Barb. 84; *Trull v. Eastman*, 3 Metc. 121. See also *ante*, sects. 727, 728.

⁵ *Jackson v. Wright*, 14 Johns. 193.

⁶ See *ante*, sects. 727, 728.

is necessary to be acknowledged or proved, in order to pass the title to real estates. Without qualification and explanation, this is incorrect and misleading. All common-law conveyances, properly so-called, which operate by transmutation of possession, or as grants, such as feoffments, releases, etc., and modern statutory conveyances, where the statute does not provide otherwise, will be effectual to pass the legal estate of any interest in lands, and, except in the case of the grant of a fee by a common-law conveyance, the equitable estate also, without resting upon any consideration whatever.¹ And where a deed can operate both as a common-law conveyance and as a conveyance under the Statute of Uses, the want of a consideration will not prevent it from passing the legal title as a common-law conveyance.² A common-law conveyance passes the legal title without a consideration, but if the estate granted is a fee simple, since it is presumed under the doctrine of resulting uses that a man will not part with the beneficial interest in real property without receiving some consideration therefor, the use or equitable interest therein results to the grantor, and the Statute of Uses draws the legal seisin out of the grantee and reverts it in the grantor.³ But this is merely a legal presumption, and may be rebutted by other evidence appearing in the deed and showing a contrary intention on the part of the grantor.⁴ For this reason it is customary in Massachusetts, and, perhaps, in other States, in the ordinary deed to grant the premises to the grantee and his heirs, to

¹ *Green v. Thomas*, 11 Me. 318; *Laberee v. Carlton*, 53 Me. 212; *Boynton v. Rees*, 8 Pick. 332; *Smith v. Allen*, 5 Allen, 458; *Rogers v. Hillhouse*, 3 Conn. 398; *Winans v. Peebles*, 31 Barb. 380; *Taylor v. King*, 6 Munf. 358; *Den v. Hanks*, 5 Ired. 30; *Doe v. Hurd*, 7 Blackf. 510; *Thompson v. Thompson*, 9 Ind. 331; *Pierson v. Armstrong*, 1 Clarke (Iowa), 282; *Perry v. Price*, 1 Mo. 553; *Jackson v. Dillon*, 2 Overt. 261.

² *Cheney v. Watkins*, 1 Harr. & J. 527; *Den v. Hanks*, 5 Ired. 30; *Poe v. Donec*, 48 Mo. 431. See *ante*, sects. 779, 782.

³ See *ante*, sect. 443.

⁴ See *ante*, sect. 443.

his and their use. The employment of the italicised clause excludes the idea of a resulting use.¹ Mr. Williams says: "All that was ultimately effected by the Statute of Uses was to impart into the rules of law some of the then existing doctrines of the courts of equity, and to add three words, *to the use*, to every conveyance."² It is, however, different with conveyances which operate under the Statute of Uses, such as bargain and sale, covenant to stand seised, lease and release. For reasons already explained,³ in all three of these conveyances a consideration is necessary, in order to raise in the grantee the use which the statute is to execute. In a bargain and sale, or lease and release, a valuable consideration was necessary, while a good consideration was sufficient to support a covenant to stand seised.⁴ In Missouri it seems doubtful that a valuable consideration must be acknowledged or proved in a bargain and sale.⁵ And in Tennessee it has been held unnecessary under their statute to acknowledge a consideration in any deed.⁶ But if there be a *good* consideration between the parties, although the deed be in form a bargain and sale, it will be treated as a covenant to stand seised.⁷ And although a consideration is generally necessary to the validity of deeds under the Stat-

¹ 2 Washb. on Real Prop. 440; Williams on Real Prop. 188; 2 Sand. on Uses, 64-69.

² Williams on Real Prop. 159, 160.

³ See *ante*, sects. 444, 773-776.

⁴ Goodspeed v. Fuller, 46 Me. 141; Jackson v. Florence, 16 Johns. 47; Jackson v. Caldwell, 1 Cow. 622; Jackson v. Delancey, 4 Cow. 427; Okison v. Patterson, 1 Watts & S. 395; Boardman v. Dean, 84 Pa. St. 252; Cheney v. Watkins, 1 Harr. & J. 527; Den v. Hanks, 5 Ired. 30; Wood v. Beach, 7 Vt. 522; Young v. Ringo, 1 B. Mon. 30; Webb v. Webb, 29 Ala. 606; Kinnebrew v. Kinnebrew, 35 Ala. 636.

⁵ Perry v. Price, 1 Mo. 553. That is, because the same deed may operate as a feoffment, since the delivery and registration of the deed are equivalent to livery of seisin. See also Poe v. Domec, 48 Mo. 441.

⁶ Jackson v. Dillon, 2 Overt. 261. See also Fetrow v. Meriweather, 53 Ill. 278.

⁷ See *ante*, sects. 774-776, 782.

ute of Uses, it is not necessary that the consideration should actually be passed to the grantor if the receipt of a proper consideration is acknowledged by him in the deed. But it must be acknowledged in the deed, or proved *aliunde* to have actually passed.¹ The acknowledgment of the consideration is only *prima facie* evidence of the character and amount of the consideration. And if one is expressed, another consideration may be proved if it be not inconsistent with or contradictory of the one expressed.² But no parol evidence will be admitted to prove that the consideration acknowledged in the deed was never paid, in order to invalidate the deed between the grantor and grantee.³ The amount acknowledged is presumed to be the true consideration agreed upon; but this is not conclusive. In an action to enforce the payment of the consideration a different amount may be established by parol evidence, and the acknowledgment of the receipt of the consideration is no bar to its recovery. The recital of the consideration in a deed

¹ Jackson v. Alexander, 3 Johns. 434; Jackson v. Pike, 9 Cow. 69; Jackson v. Leek, 19 Wend. 339; Jackson v. Schoonmaker, 2 Johns. 230; Wood v. Beach, 7 Vt. 522; White v. Weeks, 1 Pa. St. 486; Den v. Hanks, 5 Ired. 30; Toulmin v. Austin, 5 Stew. & P. 470; Young v. Ringo, 1 B. Mon. 30. But see Boardman v. Dean, 34 Pa. St. 252. The acknowledgment of a consideration will be sufficient to raise a use only when it is under seal. In order, therefore, that a bargain and sale may create a use and pass the legal title by an instrument in writing not under seal, in conformity with the doctrine laid down in sect. 783, a consideration must actually pass from the grantee to the grantor.

² Pierce v. Brew, 43 Vt. 295; Drury v. Tremont, etc., Co., 13 Allen, 171; Paige v. Sherman, 6 Gray, 511; Miller v. Goodwin, 8 Gray, 542; Morris Canal v. Ryerson, 27 N. J. L. 467; Parker v. Foy, 43 Miss. 260; Toulmin v. Austin, 5 Stew. & P. 410; Rabsuhl v. Lack, 35 Mo. 316; Lawton v. Buckingham, 15 Iowa, 22; Harper v. Perry, 28 Iowa, 63.

³ Trafton v. Hawes, 102 Mass. 541; Wilkinson v. Scott, 17 Mass. 257; Ballard v. Briggs, 7 Pick. 537; Basford v. Pearson, 9 Allen, 393; Goodspeed v. Fuller, 46 Me. 141; Bassett v. Bassett, 55 Me. 127; Rockwell v. Brown, 54 N. Y. 213; Murdock v. Gilchrist, 52 N. Y. 246; Calloway v. Hearn, 1 Houst. 610; Mendenhall v. Parish, 8 Jones L. 108; Lowe v. Weatherley, 4 Dev. & B. 212; Kimball v. Walker, 30 Ill. 511; Lake v. Gray, 35 Iowa, 462; Kumler v. Ferguson, 7 Minn. 442; Coles v. Soulsby, 21 Cal. 47; Rhim v. Ellen, 36 Cal. 362.

is only conclusive as to the fact that there was a consideration to the deed.¹

§ 802. **Voluntary and fraudulent conveyances.**—Although a consideration may not be necessary to make a valid conveyance, as between the parties and their privies, the question presents a different phase in respect to the creditors of the grantor. Questions of this kind arise under the statutes 13 Eliz. ch. 5, and 27 Eliz. ch. 4, which have been substantially re-enacted in all the States of this country. The statutes are said to be affirmatory of the common law. Whether this be so is a matter of very little importance. Under the statutes, if a conveyance of lands is made without a substantial valuable consideration, while the grantor is in debt, under certain circumstances at least, existing creditors can avoid the conveyance, and satisfy their demands by proceeding against the land. If the conveyance is to any one except a child or wife, or in other words, where there is not even a good consideration passing between the parties, the conveyance is in any case void as against existing creditors.² But in a voluntary conveyance to a wife or child, if at the time of the conveyance sufficient was left in the hands of the grantor to amply secure existing

¹ *Goodspeed v. Fuller*, 46 Me. 141; *Bassett v. Bassett*, 55 Me. 127; *Pierce v. Brew*, 43 Vt. 295; *Beach v. Packard*, 10 Vt. 96; *Paige v. Sherman*, 6 Gray, 511; *Miller v. Goodwin*, 8 Gray, 542; *Wilkinson v. Scott*, 17 Mass. 257; *Murdock v. Gilchrist*, 52 N. Y. 246; *Grout v. Townsend*, 2 Denio, 335; *Morris Canal v. Ryerson*, 27 N. J. L. 467; *Callaway v. Hearn*, 1 Houst. 610; *Mendenhall v. Parish*, 8 Jones L. 108; *Lowe v. Weatherley*, 4 Dev. & B. 212; *Parker v. Foy*, 43 Miss. 260; *Rabsuhl v. Lack*, 35 Mo. 316; *Kimball v. Walker*, 30 Ill. 511; *Rockhill v. Spraggs*, 9 Ind. 30; *Lawton v. Buckingham*, 15 Iowa, 22; *Harper v. Perry* 28 Iowa, 63; *Kumler v. Ferguson*, 7 Minn. 442; *Irvine v. McKeon*, 23 Cal. 475; *Rhim v. Ellen*, 36 Cal. 362.

² *Sexton v. Wheaton*, 8 Wheat. 229; *Hinde's Lessee v. Longworth*, 11 Wheat. 199; *Lerow v. Wilmarth*, 9 Allen, 386; *Reade v. Livingston*, 3 Johns. Ch. 500; *Salmon v. Bennett*, 1 Conn. 525; *Washband v. Washband*, 27 Conn. 424; *Doe v. Hurd*, 7 Blackf. 510; *Mercer v. Mercer*, 29 Iowa, 557; *Bullitt v. Taylor*, 34 Miss. 708.

creditors, the conveyance will nevertheless be good. But if the grantor is insolvent, then it may be avoided by existing creditors.¹ Subsequent creditors have no interest in such conveyances, and cannot avoid them unless they have been made with an actual fraudulent intent,² and then they may be avoided by subsequent as well as existing creditors.³ And even where the consideration is valuable, if it is done with a fraudulent intent, and the grantee participates in the fraud, the deed can be avoided by creditors. But if the grantee is an innocent purchaser for value, he acquires a good title free from the claims of the creditors.⁴ Voluntary conveyances are those which do not rest upon a valuable consideration. And under the term "valuable consideration" the law includes everything possessing a pecuniary value, and likewise a promise to marry, as well as actual marriage. Conveyances possessing any one of these considerations are not voluntary.⁵ Although the valuable con-

¹ *Lerow v. Wilmarth*, 9 Allen, 386; *Pomeroy v. Bailey*, 43 N. H. 118; *Van Wyck v. Seward*, 6 Paige, 62; *Baker v. Bliss*, 39 N. Y. 70; *Posten v. Posten*, 4 Whart. 42; *Miller v. Pearce*, 6 Watts & S. 101; *Gridley v. Watson*, 53 Ill. 193; *Bridgford v. Riddel*, 55 Ill. 261; *Pratt v. Myers*, 56 Ill. 24; *Stewart v. Rogers*, 25 Iowa, 395; *Baldwin v. Tuttle*, 23 Iowa, 74.

² *Thacher v. Phinney*, 7 Allen, 150; *Beal v. Warren*, 2 Gray, 447; *Trafton v. Hawes*, 102 Mass. 541; *Lormore v. Campbell*, 60 Barb. 62; *Stone v. Myers*, 9 Minn. 311.

³ *Marston v. Marston*, 54 Me. 476; *Parkman v. Welch*, 19 Pick. 231; *Coolidge v. Melvin*, 42 N. H. 521; *Redfield v. Buck*, 35 Conn. 329; *Paulk v. Cooke*, 39 Conn. 566; *Van Wyck v. Seward*, 6 Paige, 62; *Savage v. Murphy*, 34 N. Y. 508; *Case v. Phelps*, 39 N. Y. 104; *Williams v. Davis*, 69 Pa. St. 21; *Pratt v. Myers*, 56 Ill. 24; *Bridgford v. Riddel*, 55 Ill. 261; *Bullitt v. Taylor*, 34 Miss. 740; *Herschfeldt v. George*, 6 Mich. 466.

⁴ *Oriental Bank v. Haskins*, 3 Metc. 340; *Somes v. Brewer*, 2 Pick. 184; *Bridge v. Eggleston*, 14 Mass. 250; *Wadsworth v. Williams*, 100 Mass. 131; *Clapp v. Tirrell*, 20 Pick. 247; *Jackson v. Henry*, 10 Johns. 185; *Verplanck v. Sterry*, 12 Johns. 552; *Carpenter v. Murin*, 42 Barb. 300; *Wright v. Brandis*, 1 Ind. 336; *Ruffing v. Tilton*, 12 Ind. 260; *Hughes v. Monty*, 24 Iowa, 499; *Chapel v. Clapp*, 29 Iowa, 194; *Wright v. Howell*, 35 Iowa, 292.

⁵ *Prodgers v. Langham*, 1 Sid. 133; *Smith v. Allen*, 5 Allen, 453; *Washband v. Washband*, 27 Conn. 424; *Sterry v. Arden*, 1 Johns. Ch. 261; *Huston v. Cantril*, 11 Leigh, 176; *Rockhill v. Spraggs*, 9 Ind. 32.

sideration must be substantial, it need not be adequate in order to make the conveyance good against creditors.¹ It is further necessary, in order that a conveyance may be avoided by creditors, that the thing conveyed must be subject to levy and sale under execution. The conveyance of a homestead without consideration cannot be avoided by creditors for being voluntary.²

§ 803. **Operative words of conveyance.** — To make a complete and valid conveyance, it is also necessary that the deed should contain what are termed operative words of conveyance, *i.e.*, words which clearly manifest the intent of the grantor to part with his interest or estate in the land. It has been shown more at length in a previous chapter what are the technical operative words usually employed in the different kinds of common-law and statutory conveyances,³ and nothing further in respect to them need be added here. The deed, in general use in all the States, contains ordinarily the words “give, grant, bargain, and sell,” and this deed may be construed to be a primary or secondary conveyance, a common-law conveyance, or one under the Statute of Uses, according as one or the other construction would best effectuate the intention of the parties.⁴ Not only is this the rule, but it is not even necessary to use the technical operative words of any kind of conveyance, although it is advisable to do so to remove all doubt as to the validity of the conveyance. Any words, although not rec-

¹ Washband v. Washband, 27 Conn. 424; Sexton v. Wheaton, 8 Wheat. 229; Hinde's Lessee v. Longworth, 11 Wheat. 199; Salmon v. Bennett, 1 Conn. 525; Lerow v. Wilmarth, 9 Allen, 380; Reade v. Livingston, 3 Johns. Ch. 500; Bullitt v. Taylor, 34 Miss. 708; Mercer v. Mercer, 29 Iowa, 557; Doe v. Hurd, 7 Blackf. 510.

² Gassett v. Grout, 4 Metc. 490; Danforth v. Beattie, 43 Vt. 138; Wood v. Chambers, 20 Texas, 254; Dreutzer v. Bell, 11 Wis. 114; 3 Washb. on Real Prop. 334.

³ See *ante*, ch. XXI., sect. 3.

⁴ See *ante*, sect. 782.

ognized as formal or technical words of conveyance, will be sufficient, if they establish clearly the intention to transfer the estate.¹ Thus, where the grant was to A. and his heirs, provided if A. died in his minority without issue, then the property was *to go* to the issue of B., the word *go* was held sufficient, in connection with the previous grant, to pass the estate to the issue of B.² And the word *alien* has been held sufficient to pass an estate reversion, where the conveyance would not operate as a bargain and sale, for the want of enrollment.³ On the other hand, a deed, in which the only words of conveyance were “*sign over*,” was held to be invalid.⁴ In like manner, it would not be fatal to the validity of the deed if the operative words are in the past, instead of the present tense, for example, “has given and granted,” instead of “do give and grant,” but it is the prevailing custom in most parts of this country to use both tenses, viz.: *have given and granted and do hereby give and grant*, although the past tense is mere surplusage.⁵

§ 804. **Execution, what constitutes.** — By the execution of a deed is here meant the various formalities required by law for the completion of it, which include signing, sealing, attestation and acknowledgment. A deed may be executed either by the grantor himself, or by an agent duly authorized to act for him.

§ 805. **Power of attorney.** — It requires, however, to enable an agent to execute a deed for his principal, a power of attorney under seal, the rule of agency being that the

¹ *Roe v. Tranmarr*, 2 Wils. 75; *s. c.*, *Smith's Ld. Cas.*; *Shove v. Pincke*, 5 T. R. 124; *Marden v. Chase*, 32 Me. 229; *Lynch v. Livingston*, 8 Barb. 463; *Ivory v. Burns*, 56 Pa. St. 300; *Folk v. Varn*, 9 Rich. Eq. 303; *Young v. Ringo*, 1 B. Mon. 30; *McKinney v. Settles*, 31 Mo. 541.

² *Folk v. Varn*, 9 Rich. Eq. 303.

³ *Adams v. Steer*, Cro. Jac. 210.

⁴ *McKinney v. Settles*, 31 Mo. 541.

⁵ 3 Washb. on Real Prop. 378; *Pierson v. Armstrong*, 1 Iowa, 292.

power must be of the same grade of instrument as that which the agent is to execute.¹ This statement must be qualified by the remark that, if it is executed by the agent in the presence of the principal, it is constructively the manual act of the principal, and needs no power of attorney under seal.² This is not only the rule in regard to ordinary agencies, but applies also to the general agency of partners in a partnership. Without an express authority granted by a power of attorney under seal, the conveyance by one partner of partnership lands, although in the name of the partnership, will pass only his interest or share in the property. And a subsequent ratification, to be effective, must also be by an instrument under seal.³ In respect to the manner in which the deed must be executed, when done by an agent, the law is extremely technical. In the execution, the act must appear to be that of the principal, and the deed must show through whom the principal acts. It must be the principal's deed; he must grant and convey the land. If the premises of the deed are in the name of the agent, although he signs the deed as agent, and the deed contains a recital of his authority, it will not be the deed of the principal, and hence inoperative.⁴ The proper mode of

¹ *Livingston v. Peru Iron Co.*, 9 Wend. 522; *Hanford v. McNair*, 9 Wend. 54; *Stetson v. Patten*, 2 Me. 358; *Montgomery v. Dorion*, 6 N. H. 250; *Tappan v. Redfield*, 5 N. J. Eq. 399; *Kime v. Brooks*, 9 Ired. 219; *Doe v. Blacker*, 27 Ga. 418; *Smith v. Dickenson*, 6 Humph. 261; *Plummer v. Russel*, 2 Bibb, 17; *Rhode v. Louthain*, 8 Blackf. 413; *Moore v. Pendleton*, 16 Ind. 481; *Videau v. Griffin*, 21 Cal. 389.

² *Ball v. Duntersville*, 4 T. R. 313; *King v. Longnor*, 4 B. & Ad. 647; *Frost v. Deering*, 21 Me. 156; *Burns v. Lynde*, 6 Allen, 309; *Gardner v. Gardner*, 5 Cush. 483; *Wood v. Goodridge*, 6 Cush. 117; *McKay v. Bloodgood*, 9 Johns. 285; *Kime v. Brooks*, 9 Ired. 219; *Videau v. Griffin*, 21 Cal. 392.

³ Pars. on Part. 369; 3 Washb. on Real Prop. 262. In Iowa a parol ratification is held to be sufficient to effectuate the conveyance by one partner. *Haynes v. Seacrest*, 13 Iowa, 455.

⁴ 3 Washb. on Real Prop. 277; *Copeland v. Mercantile Ins. Co.*, 6 Pick. 198; *Squier v. Morris*, 1 Lans. 282; *Townsend v. Smith*, 4 Hill, 351; *Martin v. Flowers*, 8 Leigh, 158; *Briggs v. Partridge*, 7 J. & Sp. 339.

signing is A. (principal) by B. (agent); and there are some authorities which hold that no other signature will be a good execution. But the rule has of late been somewhat relaxed, so that where the deed purports in terms to be the act of the principal, and the signature is B. (agent) for A. (principal), or B. as the attorney of A., and the like, it will be a valid execution.¹ But the deed must be in the name of the principal, and it must be sealed with his seal.² If signed by the agent without affixing the principal's name, it will be a defective execution; and so also, if the principal's name is signed without mentioning that it was done by attorney.³ But it has been held that a recital in the deed, that it was executed by the grantor by attorney, does away with the necessity of the signature of the agent.⁴ To be good the principal must also be alive.⁵ A common-law power of attorney dies with the principal, and the deed by the attorney after the death of the principal is absolutely void.⁵ But the reader must here bear in mind the important distinction already explained between powers of attorney, a common-law authority, and powers of appointment, operating under the Statute of Uses and the Statute of Wills. The latter vest upon their creation an irrevocable equitable interest in the donee, which survives the principal, and is executed in the name of the donee. Authors very often speak of

¹ *Wilkes v. Back*, 2 East, 142; *Mussey v. Scott*, 7 Cush. 216; *Jones v. Carter*, 4 Hen. & M. 196; *Doe v. Blacker*, 27 Ga. 418; *Butterfield v. Beal*, 3 Ind. 208; *Wilburn v. Larkin*, 3 Blackf. 55; *Hunter v. Miller*, 6 B. Mon. 612; *Martin v. Almond*, 25 Mo. 313; *Wilkinson v. Getty*, 13 Iowa, 157.

² *Elwell v. Shaw*, 16 Mass. 42; *Townshend v. Corning*, 23 Wend. 439; *Barger v. Miller*, 4 Wash. C. Ct. 280; *Harper v. Hampton*, 1 Harr. & J. 709; *Echols v. Cheney*, 28 Cal. 160; *Morrison v. Bowman*, 29 Cal. 352.

³ *Elwell v. Shaw*, 16 Mass. 42; *Wood v. Goodridge*, 6 Cush. 117; *Thurman v. Cameron*, 24 Wend. 90.

⁴ *Devinney v. Reynolds*, 1 Watts & S. 328.

⁵ *Harper v. Little*, 2 Me. 14; *Stetson v. Patten*, 2 Me. 358; *Bergen v. Bennett*, 1 Caines' Cas. 15; *Hunt v. Rousmaniere*, 2 Mason, 249; *Wilson v. Troup*, 2 Cow. 236; *Mansfield v. Mansfield*, 6 Conn. 562; *Ferris v. Irving*, 28 Cal. 648.

powers coupled with an interest, as distinguishable from common-law powers of attorney, in respect to the irrevocability of the former. Except as a power of appointment under the Statute of Uses and the Statute of Wills, there is no such power in the common-law of real property as one coupled with an interest.¹

§ 806. **Power of attorney granted by married woman.** — It is the settled law in a number of the States that a married woman cannot make a valid power of attorney, authorizing the conveyance of her lands, even though the power is executed jointly with her husband, and acknowledged by her in the manner pointed out by the statute for the acknowledgment of her deeds.² And a deed by the husband's attorney, conveying lands of the wife, which is executed and acknowledged by the wife, has also been held invalid.³ But it is difficult to discover any reason for not permitting her to do by an agent what she is authorized to do herself, provided the formalities required by statute for the execution of deeds by married women have been complied with in the execution of the power of attorney. And such a power has been expressly recognized by statute in some of the States, while in others it seems to be taken for granted that she may execute a valid power of attorney.⁴ It is, however, apparently well settled that a power of attorney exe-

¹ See *ante*, sect. 558.

² *Allen v. Hooper*, 50 Me. 373; *Holladay v. Daily*, 19 Wall. 609; *Sumner v. Conant*, 10 Vt. 9; *Earle v. Earle*, 1 Spen. 347; *Kearney v. Maccomb*, 16 N. J. Eq. 189; *Lewis v. Coxe*, 5 Harr. 401. See *Dawson v. Shirley*, 6 Blackf. 531.

³ *Toulmin v. Heidelberg*, 32 Miss. 268.

⁴ *Roarty v. Mitchell*, 7 Gray, 243; *Gridley v. Wynant*, 23 How. 503; *Weisbrod v. Chicago & N. W. R. R.*, 18 Wis. 41; *Wilkinson v. Getty*, 13 Iowa, 137; *Koch v. Briggs*, 14 Cal. 262; *Dow v. Gould*, 31 Cal. 646. In *Hardenburg v. Larkin*, 47 N. Y. 113, that the common law did not permit a married woman to execute a deed by attorney; but she is now authorized by statute to do so. In *Dawson v. Shirley*, 6 Blackf. 531, it was held that a married woman could not acknowledge her deed by attorney.

cut by a *feme sole* will be revoked by her subsequent marriage.¹

§ 807. **Signing.** — At common law it was not necessary for the parties to sign the deed, although under the Saxon laws the deeds were subscribed with the sign of the cross, and were not required to be sealed. After the Norman conquest sealing was invariably required, but signing became unnecessary.² It seems that in some of the States to a very late day a deed is recognized as a valid conveyance without being signed by the parties, but in most of them, if not all, signing is absolutely required, and in all it is customary and advisable.³ Sometimes the statute requires the deed to be *subscribed*. In that case the parties must write their names at the bottom of the instrument. But, generally, in the absence of such a statute, the signature in any part of the deed would suffice; and, although it is usual for the grantor to write the signature himself, it is not always necessary. To enable an ignorant person to execute a deed one may, at his request, and in his presence, sign his name, and, by affixing a mark to the signature, the grantor adopts the signature as his own, and the deed will be valid.⁴ It is not even necessary that the grantor should affix his mark in order to adopt the signature as his own. If done in his presence, the signature by the authorized agent is theoretically the act of the principal, and the deed is valid, though

¹ 3 Washb. on Real Prop. 259; 2 Kent's Com. 645; *Judson v. Sierra*, 22 Texas, 365.

² 3 Washb. on Real Prop. 270; Co. Lit. 171 b; *Van Santwood v. Sandford*, 12 Johns. 198; *Hutchins v. Byrne*, 9 Gray, 367; *Hammond v. Alexander*, 1 Bibb, 333; *Taylor v. Morton*, 5 Dana, 365; 2 Bla. Com. 309; *Williams on Real Prop.* 152.

³ *Sicard v. Davis*, 6 Pet. 124; *Clark v. Graham*, Wheat. 519; *Hutchins v. Byrnes*, 9 Gray, 367; *Isham v. Bennington*, 19 Vt. 232; *Elliott v. Sleeper*, 2 N. H. 529; *McDill v. McDill*, 1 Dall. 64; *Plummer v. Russel*, 2 Bibb, 174; *Chiles v. Conley*, 2 Dana, 21.

⁴ *Baker v. Denning*, 8 Ad. & El. 94; *Truman v. Lore*, 14 Ohio St. 154.

it is not shown that the grantor has been disabled by any cause from signing himself.¹ And in one case it was held that where a wife signed her husband's name to a deed in his absence, and he afterwards acknowledged it as his act and deed, and delivered it to the grantee, the subsequent acknowledgment and delivery constituted a ratification, or rather an adoption, of the signature as his own, and that the deed was properly executed.² This case was different from the case where the entire execution of the deed was intrusted to another. Then, as has been explained in a preceding paragraph, a power of attorney under seal would have been required.

§ 808. *Sealing*. — At common law sealing was an important part of the execution, although, as has been stated, signing was dispensed with.³ This circumstance arose, no doubt, from the fact that very few people in the early days of the common law could write and sign their names, and it became customary to identify their solemn deeds by attaching their seals, which were peculiar and easily recognized. Although it has now become a mere formality, it is still held to be indispensable in most of the States, possibly in all except Kentucky, Iowa, Alabama, Kansas, Louisiana and Texas, where by statute seals have been abolished as a requisite of a deed.⁴ The word deed means an instrument under seal, and, except in those States where seals are by statute dispensed with, no instrument can be called a deed without

¹ *Ball v. Duntersville*, 4 T. R. 313; *Frost v. Deering*, 21 Me. 156; *Gardner v. Gardner*, 5 Cush. 483; *Wood v. Goodridge*, 6 Cush. 117; *Burns v. Lynde*, 6 Allen, 309; *McKay v. Bloodgood*, 9 Johns. 285; *Kime v. Brooks*, 9 Ired. 219; *Videau v. Griffin*, 21 Cal. 392.

² *Bartlett v. Drake*, 100 Mass. 175.

³ 2 Bla. Com. 309; 3 Washb. on Real Prop. 270, 271.

⁴ 3 Washb. on Real Prop. 271. See *Shelton v. Armor*, 13 Ala. 647; *Simpson v. Mundee*, 3 Kan. 172; *Pierson v. Armstrong*, 1 Clarke (Iowa), 293.

being sealed, whatever may be the intention of the parties.¹ But there need be no reference in the attestation clause of the deed to the sealing, if the seal is actually affixed, although it is usual to state that the party has set his hand and seal thereto.² It is not necessary for the party to affix the seal himself. It may be done by any one else, provided he is authorized to do so, or the unauthorized act is subsequently ratified and adopted by the acknowledgment and delivery of the deed.³ And one seal may be adopted as the seal of all the parties to the deed.⁴ In respect to what will constitute a sufficient sealing the law is not uniform. At common law impression upon wax or some tenacious substance was required. Lord Coke says: "It is required that the deed, charter, or writing, must be sealed, that is, have some impression upon wax; for *sigillum est cera impressa, quia cera sine impressione non est sigillum*."⁵ In the New England States and New Jersey, unless changed by recent legislation, the common-law seal is required, although probably in no place would it be necessary to use wax or substance of that character, an impression of a seal upon paper being sufficient. At least such is the opinion of the United States Supreme Court.⁶ But in the majority of the States

¹ Warren v. Lynch, 5 Johns. 239; Jackson v. Wood, 12 Johns. 13; Jackson v. Wendell, 12 Johns. 355; Wadsworth v. Wendell, 5 Johns. Ch. 224; Underwood v. Campbell, 14 N. H. 393; Taylor v. Glaser, 2 Serg. & R. 502; Cline v. Black, 4 McCord, 431; Davis v. Brandon, 1 How. (Miss.) 154; Alexander v. Polk, 39 Miss. 737; Deming v. Bullitt, 1 Blackf. 241; McCabe v. Hunter, 7 Mo. 355; Davis v. Judd, 6 Wis. 85.

² State v. Peck, 53 Me. 299; Bradford v. Randall, 5 Pick. 496; Mill Dam Foundry v. Hovey, 21 Pick. 417; Taylor v. Glaser, 2 Serg. & R. 502.

³ Koehler v. Black River, etc., Co., 2 Black, 715; Elwell v. Shaw, 16 Mass. 42; Co. Lit. 6 a; 3 Washb. on Real Prop. 272.

⁴ Bradford v. Randall, 5 Pick. 496; Tasker v. Bartlett, 5 Cush. 309; Warren v. Lynch, 5 Johns. 239; McKay v. Bloodgood, 9 Johns. 285; Atlantic Dock Co. v. Leavett, 54 N. Y. 35; Lambden v. Sharp, 9 Humph. 224.

⁵ 3 Inst. 169. See Warren v. Lynch, 5 Johns. 239; Bradford v. Randall, 5 Pick. 496; Tasker v. Bartlett, 5 Cush. 359.

⁶ Pillow v. Roberts, 13 How. 473. See Bates v. B. & N. Y. Cent. R. R., 10 Allen, 254.

a simple scroll, with "L. S.," or the word "seal" written in it, is a sufficient sealing.¹ But it has been held that to make a scroll a good sealing, there must be a recital in the deed that the party has affixed his seal.²

§ 809. **Attestation.** — A further requisite is that the execution be done in the presence of one or more witnesses. At common law this was not necessary,³ and is still unnecessary in some of the States.⁴ But generally, in the United States, witnesses are required, the number varying with the statutory regulation of each State. In some only one witness is required, but the usual number is two.⁵ And if the number of witnesses required by law is not obtained, the deed is generally held to be invalid as a legal conveyance, although in New Hampshire and Kentucky the deed without proper attestation is good between the parties,⁶ and in Ver-

¹ The scroll is a good seal in Arkansas, Connecticut, Delaware, Florida, Michigan, Wisconsin, Minnesota, Oregon, Missouri, Ohio, Texas, Illinois, Mississippi, Georgia, Indiana, Maryland, North Carolina, Pennsylvania, and South Carolina. 3 Washb. on Real Prop. 274, 275. See *Warren v. Lynch*, 5 Johns. 239; *Williams v. Starr*, 5 Wis. 549; *McRaven v. McGuire*, 9 Smed. & M. 34. In *Turner v. Field*, 44 Mo. 382, the Supreme Court of Missouri held that a piece of colored paper, attached to the deed by mucilage, would be sufficient.

² *Cromwell v. Tate*, 7 Leigh, 301. But see *Ashwell v. Ayres*, 4 Gratt. 283; *Comerford v. Cobb*, 2 Fla. 498; *McGuire v. McRaven*, 9 Smed. & M. 34.

³ 2 Bla. Com. 307; *Dale v. Thurlow*, 12 Metc. 157; *Thacher v. Phinney*, 7 Allen, 149; *Craig v. Pinson, Cheves*, 273; *Meuley v. Zeigler*, 23 Texas, 88.

⁴ *Dale v. Thurlow*, 12 Metc. 157; *Long v. Ramsey*, 1 Serg. & R. 73; *Wisswall v. Ross*, 4 Port. 321; *Ingram v. Hall*, 1 Hayw. 205.

⁵ *Clark v. Graham*, 6 Wheat. 577; *Merwin v. Camp*, 3 Conn. 35; *Coit v. Starkweather*, 8 Conn. 289; *Winsted Sav. Bk. v. Spencer*, 26 Conn. 195; *Stone v. Ashley*, 13 N. H. 38; *Hastings v. Cutler*, 24 N. H. 481; *Kingsley v. Holbrook*, 45 N. H. 320; *Craig v. Pinson, Cheves*, 272; *Patterson v. Pease*, 5 Ohio, 119; *Richardson v. Bates*, 8 Ohio St. 261; *Fitzhugh v. Croghan*, 2 J. J. Marsh. 429; *Wilkins v. Wells*, 8 Smed. & M. 325; *Shirley v. Fearn*, 33 Miss. 653; *Chandler v. Kent*, 8 Minn. 525; *Ross v. Worthington*, 11 Minn. 443.

⁶ *Stone v. Ashley*, 13 N. H. 38; *Hastings v. Cutler*, 24 N. H. 481; *Kingsley v. Holbrook*, 45 N. H. 320; *Fitzhugh v. Croghan*, 2 J. J. Marsh. 429. See *contra*, *Crane v. Reeder*, 21 Mich. 24.

mont and Minnesota, where two witnesses are required, subscription by one witness will enable the deed to be used in equity to support an action for specific performance.¹ The witnesses are required in making a proper attestation to sign their names to the instrument, and to witness the execution of it by the grantor. But it is not necessary that it should be executed by the parties in his presence. It is sufficient if the witnesses are requested by the parties to subscribe to the attestation clause, and the signatures on the deed are acknowledged by the parties to be theirs.² Witnesses to deeds are intended merely to attest the execution of the deed, and cannot, like witnesses to wills, express opinions upon the mental capacity of the parties to the deed.³ Mr. Washburn cites Mr. Barrington to the effect that anciently the witnesses were a necessary part of the jury which was to try the validity of the instrument, and a statute then dispensed with the necessity of their presence, when after being duly summoned they fail to appear.⁴

§ 810. **Acknowledgment or probate.** — As a general rule, it is not required, to make the deed valid, that a certificate of acknowledgment or probate be attached to it.⁵ But in Ohio the certificate is necessary to pass the title, and in New York and Texas an unacknowledged deed is not good against subsequent purchasers and incumbrances.⁶ And perhaps in all the States the acknowledgment by a married woman is absolutely required, and must conform strictly to

¹ *Day v. Adams*, 42 Vt. 520; *Ross v. Worthington*, 11 Minn. 438.

² *Parke v. Mears*, 2 B. & P. 217; *Jackson v. Phillips*, 9 Cow. 113.

³ *Dean v. Fuller*, 40 Pa. St. 474.

⁴ 3 Washb. on Real Prop. 277, citing Barring. St. (4th ed.) 175.

⁵ *Gibbs v. Swift*, 12 Cush. 393; *Blain v. Stewart*, 2 Iowa, 383; *Lake v. Gray*, 30 Iowa, 415; s. c., 35 Iowa, 459; *Doe v. Naylor*, 2 Blackf. 32; *Stevens v. Hampton*, 46 Mo. 408; *Ricks v. Reed*, 19 Cal. 571.

⁶ *Smith v. Hunt*, 13 Ohio, 260; *Genter v. Morrison*, 31 Barb. 155; *Raggen v. Avery*, 63 Barb. 65; *Wood v. Chapin*, 13 N. Y. 509; *Morse v. Salisbury*, 48 N. Y. 636; *Meuley v. Zeigler*, 23 Texas, 93.

the requirements of the statute, in order to bind her.¹ But in all the States, except Kansas and Illinois, in order that a deed may be recorded, and the record furnish constructive notice to subsequent purchasers, it must be acknowledged and proved before some officer authorized to take such acknowledgments, and the certificate of acknowledgment must be indorsed in the deed.² In some of the States the acknowledgment is required to be made by the grantor, while in others the deed is probated by the oath of one of the witnesses. But the taking of the acknowledgment is a ministerial and not a judicial act. It is, therefore, no objection to the acknowledgment that it was taken by an officer related to the parties, although if he is interested in the conveyance the certificate will be valueless.³ And where the officer is only authorized to perform his special duties within certain limits of territory, an acknowledgment taken by him without these limits would of course be void.⁴ A proper certificate should show that all the requirements of the statute were substantially complied with.⁵ In some of the States the

¹ See *Bruce v. Perry*, 11 Rich. 121; *McBryde v. Wilkinson*, 29 Ala. 662; *Perdue v. Aldridge*, 19 Ind. 290.

² 3 Washb. on Real Prop. 314; *Simpson v. Mundee*, 3 Kan. 181; *Carpenter v. Dexter*, 8 Wall. 582; *Reed v. Hemp*, 16 Ill. 445.

³ *Beaman v. Whitney*, 20 Me. 413; *Withers v. Baird*, 7 Watts, 227; *Stevens v. Hampton*, 46 Mo. 408; *Wilson v. Traer*, 20 Iowa, 233; *Kimball v. Johnson*, 14 Wis. 683; *Groesbeck v. Seeley*, 13 Mich. 345. In one of the Western States a deed was presented for registration, in which the acknowledgment of a married woman, as grantor, was taken by her husband as notary public, and he certified that she was examined *separate and apart from her husband*. It is needless to remark that the deed was not a valid conveyance.

⁴ *Lynch v. Livingston*, 8 Barb. 463; s. c., 6 N. Y. 422; *Jackson v. Humphrey*, 1 Johns. 598; *Jackson v. Colden*, 4 Cow. 280; *Thurman v. Cameron*, 24 Wend. 91; *Howard Mut. L. Ass. v. McIntyre*, 3 Allen, 572; *Harris v. Burton*, 4 Harr. 66. *Contra*, *Odiorne v. Mason*, 9 N. H. 30. But in Massachusetts a magistrate for one county may take acknowledgments in another county. *Learned v. Riley*, 14 Allen, 109.

⁵ *Chandler v. Spear*, 22 Vt. 388; *Wood v. Cochrane*, 39 Vt. 544; *Tully v. Davis*, 30 Ill. 108; *Jacoway v. Gault*, 20 Ark. 190; *Bryan v. Ramirez*, 8 Cal. 461.

certificate is not conclusive evidence of the facts stated therein, but it contains *prima facie* evidence of its own genuineness, as well as of the facts therein stated.¹ And, no doubt, in all of the States, as between the parties, the certificate may be impeached for fraud.² But in the other States the certificate is conclusive against subsequent purchasers as to the facts stated therein.³

§ 811. **Reading of the deed, when necessary.** — Although the reading of the deed to the grantor and grantee can hardly be called a requisite of the deed, yet if the party is unable to read, and requests the deed to be read to him, a failure to comply with his request, or a false reading or statement of its contents, would vitiate the deed.⁴ But he must make the request. If he does not he comes under the general rule that a grantor is presumed to know the contents of the deed, and cannot avoid it on the plea of ignorance of its contents, unless the circumstances of the

¹ Jackson v. Schoonmaker, 4 Johns. 161; Jackson v. Hoyner, 12 Johns. 472; Hall v. Patterson, 51 Pa. St. 289; Borland v. Walrath, 33 Iowa, 130; Dodge v. Hollinshead, 6 Minn. 25; Annan v. Folsom, 6 Minn. 500; Edgerton v. Jones, 10 Minn. 429; Landers v. Bolton, 26 Cal. 406.

² Eyster v. Hathaway, 50 Ill. 522; Williams v. Baker, 71 Pa. St. 482; Graham v. Anderson, 42 Ill. 514; Bissett v. Bissett, 1 Har. & McH. 211; Hartley v. Frosh, 6 Texas, 208.

³ Bissett v. Bissett, 1 Har. & McH. 211; Hartley v. Frosh, 6 Texas, 208; McNeely v. Rucker, 6 Blackf. 391; Graham v. Anderson, 42 Ill. 514; Hester v. Glasgow, 79 Pa. St. 79; 21 Am. Rep. 461; Singer Mfg. Co. v. Rook, 84 Pa. St. 442; 24 Am. Rep. 204. And this is true, also, in respect to the certificate of acknowledgment by a married woman. White v. Graves, 107 Mass. 325; 9 Am. Rep. 38; Kerr v. Russell, 69 Ill. 666; 18 Am. Rep. 634; Singer Mfg. Co. v. Rook, 84 Pa. St. 442; 24 Am. Rep. 204; Johnstone v. Wallace, 53 Miss. 331; 24 Am. Rep. 699. And where the certificate in a married woman's deed is defective, it cannot be subsequently amended, unless the defect or mistake relates to an unimportant fact. Angier v. Schieffelin, 72 Pa. St. 106; 13 Am. Rep. 659; Merritt v. Yates, 71 Ill. 636; 22 Am. Rep. 128.

⁴ Manser's Case, 2 Rep. 3; Henry Pigot's Case, 11 Rep. 27 b; Souverbye v. Arden, 1 Johns. Ch. 252; Hallenback v. Dewitt, 2 Johns. 404; Jackson v. Croy, 12 Johns. 429; Jackson v. Hayner, 12 Johns. 460; Withington v. Warren, 10 Metc. 434; Taylor v. King, 6 Munf. 358.

transaction are sufficient to sustain the charge of fraud, accident or mistake.¹

§ 812. **Delivery and acceptance.** — After the deed has been signed, sealed and acknowledged, the next requisite is its delivery by the grantor and its acceptance by the grantee. These acts are as essential to the validity of a deed as signing or sealing.² As long as it remains in the possession of the grantor, and even where the deed has been stolen, and the property passes into the hands of an innocent purchaser, or falls into the possession of the grantor in any other way than by the consent of the grantee and *with the intention to pass the title*, the title is still in the grantor, and no one can acquire title from the grantee.³ But if it is once delivered, no subsequent act of the grantor can impair the validity of the conveyance. The title is in the grantee, and it cannot be recovered from him except in one of the legal and formal ways recognized by the law for acquiring property.⁴ And though the delivery was made by the grantor through the fraudulent misrepresentations of the grantee, or through some mistake of fact or law, if the delivery was an intentional act, it passes the title, and can only be divested by an equitable proceeding. If it is in the meantime conveyed to

¹ Hartshorn v. Day, 19 How. 223; Kimball v. Eaton, 8 N. H. 391; Truman v. Lore, 14 Ohio St. 155.

² Goddard's Case, 2 Rep. 4 b; Younge v. Gilbeau, 3 Wall. 641; Fairbanks v. Metcalf, 8 Mass. 230; Jackson v. Dunlap, 1 Johns. Cas. 114; Church v. Gilman, 15 Wend. 656; Fisher v. Hall, 41 N. Y. 421; Cook v. Brown, 34 N. Y. 476; Johnson v. Farley, 45 N. H. 510; Stiles v. Brown, 16 Vt. 563; Fletcher v. Mansur, 5 Ind. 267; Hulick v. Scovil, 9 Ill. 175; Overman v. Kerr, 17 Iowa, 486; Fisher v. Beckwith, 30 Wis. 55; 11 Am. Rep. 546.

³ Thoroughgood's Case, 9 Rep. 136; Chamberlain v. Staunton, 1 Leon. 140; Cutts v. York Co., 18 Me. 190; Mills v. Gore, 20 Pick. 28; Methodist Church v. Jaques, 1 Johns. Ch. 456; Roberts v. Jackson, 1 Wend. 478; Black v. Lamb, 12 N. J. Eq. 108; Hadlock v. Hadlock, 22 Ill. 388; Fisher v. Beckwith, 30 Wis. 55; 11 Am. Rep. 546.

⁴ Shelton's Case, Cro. Eliz. 7; Souverbye v. Arden, 1 Johns. Ch. 255; Younge v. Moore, 1 Strobb. 48; Connelly v. Doe, 8 Blackf. 320; Somers v. Pumphrey, 24 Ind. 240.

an innocent purchaser, he acquires an indefeasible title.¹ The title also passes, notwithstanding both parties believed that the title will not pass by delivery of the deed.² To make a good delivery, the deed must be executed completely.³ A delivery before its completion is of no effect. But, except in the case of a married woman's deed, a delivery before the acknowledgment of probate will be good, particularly in those States where the acknowledgment is not a requisite to the validity of the deed; although it seems that a delivery will not be presumed to have been made before the date of acknowledgment.⁴ Usually the deed contains the date of its execution and delivery, and although a date is not necessary to the validity of the deed,⁵ if it contains a date the deed will be presumed to have been executed and delivered on that date. But the deed only takes effect from the actual time of delivery, and the actual date of delivery will always control the date mentioned in the deed.⁶ The deed must also be delivered during the lifetime of the grantor. A delivery after his death will have no effect.⁷ But there may be an acceptance by the grantee after the grantor's death.⁸

¹ *Berry v. Anderson*, 22 Ind. 41.

² *Henchliffe v. Hinman*, 18 Wis. 138.

³ *Burns v. Lynde*, 6 Allen, 305; *McKee v. Hicks*, 2 Dev. 379.

⁴ *People v. Snyder*, 41 N. Y. 402; *Darst v. Bates*, 51 Ill. 439; *Blanchard v. Tyler*, 12 Mich. 339.

⁵ *Goddard's Case*, 2 Rep. 4 b; *Jackson v. Schoonmaker*, 2 Johns. 234; *Genter v. Morrison*, 31 Barb. 155; *Lee v. Mass. Ins. Co.*, 6 Mass. 208; *Geiss v. Odenheimer*, 4 Yeates, 278; *McKinney v. Rhoades*, 5 Watts, 343; *Colquhoun v. Atkinson*, 6 Munf. 550; *Swan v. Hodges*, 3 Head, 254; *Thompson v. Thompson*, 8 Ind. 333; *Banning v. Edes*, 6 Minn. 402.

⁶ *Xenos v. Wickham*, 14 C. B. (N. S.) 469; *Mitchell v. Bartlett*, 51 N. Y. 453; *Jackson v. Bard*, 4 Johns. 230; *Elsev v. Metcalf*, 1 Denio, 323; *Cutts v. York Co.*, 18 Me. 190; *Harrison v. Phillips' Academy*, 12 Mass. 455; *Smith v. Porter*, 10 Gray, 67; *Geiss v. Odenheimer*, 4 Yeates, 278; *Colquhoun v. Atkinson*, 6 Munf. 550; *Savery v. Browning*, 18 Iowa, 249; *Lyon v. McIlvain*, 24 Iowa, 15.

⁷ *Shoenberger v. Zook*, 34 Pa. St. 24; *Jackson v. Leek*, 12 Wend. 107; *Jackson v. Phipps*, 12 Johns. 421; *Fisher v. Hall*, 41 N. Y. 423; *Fay v. Richardson*, 7 Pick. 91; *Woodbury v. Fisher*, 20 Ind. 388.

⁸ See *post*, sect. 814.

Acceptance by the grantee is equally essential with delivery by the grantor. And where no proof of acceptance is offered, and the facts do not justify the legal presumption of acceptance, no title passes.¹ Until acceptance by the grantee, the title is subject to the claims of creditors who have levied upon the property after a tender of delivery.² So, also, if the grantor tenders the deed and the grantee declines to accept, the title remains unaffected in the grantor.³ If there are several grantees in a deed, the deed may be delivered to them individually on separate days. But the grantor may by express declaration make the delivery to one answer as a delivery to all.⁴ And where the deed conveys conditional limitations and remainders, the delivery to the tenant of the particular estate always constitutes a delivery to the tenants of the future or expectant estate.⁵

§ 813. **What constitutes a sufficient delivery.** — If the deed is found in the possession of the grantee, a delivery and acceptance are presumed.⁶ But, like other legal pre-

¹ *Rogers v. Cary*, 47 Mo. 232; *Younge v. Guilbeau*, 3 Wall. 636; *Jackson v. Phipps*, 12 Johns. 421; *Wilsey v. Dennis*, 44 Barb. 359; *Fonda v. Sage*, 46 Barb. 123; *Hatch v. Bates*, 54 Me. 140; *Maynard v. Maynard*, 10 Mass. 456; *Baker v. Haskell*, 47 N. H. 479; *Jones v. Bush*, 4 Harr. 1; *Pennel v. Weyant*, 2 Harr. 501; *Mitchell v. Ryan*, 3 Ohio St. 377; *Kingsbury v. Burnside*, 58 Ill. 310.

² *Parmelee v. Simpson*, 5 Wall. 86; *Derry Bank v. Webster*, 44 N. H. 268; *Johnson v. Farley*, 45 N. H. 509; *Elmore v. Marks*, 39 Vt. 538; *Woodbury v. Fisher*, 20 Ind. 389; *Jackson v. Cleveland*, 15 Mich. 101; *Day v. Griffith*, 15 Iowa, 103.

³ *Tompkins v. Wheeler*, 16 Pet. 119; *Derry Bank v. Webster*, 44 N. H. 268; *Johnson v. Farley*, 45 N. H. 509; *Cole v. Gill*, 14 Iowa, 529; *Read v. Robinson*, 6 Watts & S. 329; *Peavey v. Tilton*, 18 N. H. 152; *Xenos v. Wickham*, 14 C. B. (N. S.) 474; *Welsh v. Sackett*, 12 Wis. 243.

⁴ *Hannah v. Swarner*, 8 Watts, 9; *Tewksbury v. O'Connell*, 20 Cal. 69.

⁵ *Phelps v. Phelps*, 17 Md. 134; *Folk v. Varn*, 9 Rich. Eq. 303.

⁶ *Ward v. Lewis*, 4 Pick. 518; *Chandler v. Temple*, 4 Cush. 285; *Cutts v. York Co.*, 18 Me. 190; *Canning v. Pinkham*, 1 N. H. 353; *Clark v. Ray*, 1 Harr. & J. 319; *Southern Life Ins. Co. v. Cole*, 4 Fla. 359; *Houston v. Stanton*, 11 Ala. 412; *Ward v. Ross*, 1 Stew. (Ala.) 136; *Green v. Yarnall*, 6 Mo. 326.

sumptions, it is liable to be rebutted by proof that the possession of it was obtained without the intention of the grantor to make a delivery, or without his consent, and parol evidence is admissible to establish this fact.¹ In determining what will constitute a sufficient delivery, it is found that the intention is the controlling element. No particular formality need be observed, and the intention to deliver the deed may be manifested by acts, or by words, or by both. But one or the other must be present to make a good delivery. The grantor may direct the grantee to take the deed lying upon the table, and if the latter does so, the delivery is complete. So also if the deed is thrown down upon the table by the grantor, with the intention that the grantee should take it, although nothing should be said, it will be a good delivery.² But the intention may be manifested by still more informal proceedings. The deed need not be actually delivered if the grantor intends the execution to have the effect of a delivery, and the parties act upon the presumption.³ Thus leaving the deed to be recorded, if done with the knowledge of the grantee, and more particularly when this is done with the evident or expressed intention that the title shall pass to the grantee, will ordinarily be held a good delivery.⁴ But the intention that the registration is to operate as a delivery must be

¹ *Johnson v. Baker*, 4 B. & Ald. 440; *Adams v. Frye*, 3 Metc. 109; *Ford v. James*, 2 Abb. Pr. 162; *Roberts v. Jackson*, 1 Wend. 478; *Black v. Lamb*, 12 N. J. Eq. 116; *Black v. Shreve*, 13 N. J. 457; *Den v. Farlee*, 1 N. J. 279; *Little v. Gibson*, 39 N. H. 505; *Williams v. Sullivan*, 10 Rich. Eq. 217; *Morris v. Henderson*, 37 Miss. 501; *Wolverton v. Collins*, 34 Iowa, 238.

² *Souwerbye v. Arden*, 1 Johns. Ch. 253; *Scrugham v. Wood*, 15 Wend. 545; *Pennsylvania Co. v. Dovey*, 64 Pa. St. 260; *Stewart v. Weed*, 11 Ind. 92; *Mills v. Gore*, 20 Pick. 28; *Methodist Church v. Jacques*, 1 Johns. Ch. 456; *Williams v. Sullivan*, 10 Rich. 217.

³ *Walker v. Walker*, 42 Ill. 311; *Rogers v. Carey*, 47 Mo. 235.

⁴ *Parmelee v. Simpson*, 5 Wall. 86; *Elmore v. Marks*, 39 Vt. 538; *Pennsylvania Co. v. Dovey*, 64 Pa. St. 260; *Folly v. Vantuyl*, 9 N. J. 153; *Cooper v. Jackson*, 4 Wis. 549; *Jackson v. Cleveland*, 15 Mich. 101; *Somers v. Pumphrey*, 24 Ind. 240; *Jackson v. Leek*, 12 Wend. 107; *Jackson v. Phipps*, 12 Johns.

shown.¹ The execution of a deed before witnesses will be a fact from which delivery may be presumed.² On the other hand, if after execution the deed is retained by the grantor for any purpose which prevents the transaction from being complete, as where it is held as security for the purchase-money, there will be no presumption of delivery.³ In order that any acts may constitute a sufficient delivery, except in the case of an escrow, the grantor must part with all control of the deed. If he retains the control in any manner, as where he makes the delivery conditionally, the delivery will not be sufficient.⁴ Where the grantor is a corporation, nothing more is usually required to make a good delivery than that the deed should be executed and the common seal of the corporation affixed to the deed. But if the corporation, in executing the deed, appoint an agent to make a delivery, the formal delivery will be required.⁵ Where the grantee is a corporation, a delivery to an authorized agent and acceptance by him are considered the acts of the corporation, and, therefore, constitute a sufficient delivery and acceptance.⁶

§ 814. Delivery to stranger, when assent of grantee presumed. — Although some doubt was entertained at an

418; *Jackson v. Richards*, 6 Cow. 617; *Stillwell v. Hubbard*, 20 Wend. 44; *Mills v. Gore*, 20 Pick. 28; *Hedge v. Drew*, 12 Pick. 141; *Parker v. Hill*, 8 Metc. 447; *Berkshire Mut. Fire Ins. Co. v. Sturgis*, 13 Gray, 177; *Hawks v. Pike*, 105 Mass. 560; *Hatch v. Bates*, 54 Me. 139; *Porter v. Buckingham*, 2 Harr. 197; *Boody v. Davis*, 20 N. H. 140; *Boardman v. Dean*, 34 Pa. St. 252; *Baldwin v. Maultsby*, 5 Ired. 505; *Oliver v. Stone*, 24 Ga. 63; *Denton v. Perry*, 5 Vt. 382. See *Robinson v. Gould*, 26 Iowa, 63; *Cecil v. Beaver*, 28 Iowa, 241.

¹ *Maynard v. Maynard*, 10 Mass. 456; *Jackson v. Phipps*, 12 Johns. 418; *Elsev v. Metcalf*, 1 Denio, 326; *Pennel v. Weyant*, 2 Harr. 501; *Jones v. Bush*, 4 Harr. 1.

² *Moore v. Hasleton*, 9 Allen, 106; *Howe v. Howe*, 99 Mass. 98.

³ *Jackson v. Dunlap*, 1 Johns. Cas. 114.

⁴ *Cook v. Brown*, 34 N. H. 476; *Phillips v. Houston*, 5 Jones L. 302; *Dearmond v. Dearmond*, 10 Ind. 191; *Somers v. Pumphrey*, 24 Ind. 240; *Rivard v. Walker*, 39 Ill. 413.

⁵ 3 Washb. on Real Prop. 287, 288; Co. Lit. 22 n, 36 n.

⁶ *Western R. R. v. Babcock*, 6 Metc. 356.

early day as to its validity, it seems now to be well settled that if a deed is delivered to a stranger for the grantee, even though the grantee has not authorized the third person to receive it, if it is subsequently assented to by the grantee, it will constitute a good delivery.¹ But the grantor must part with his entire control over the deed. If the deed is handed to a stranger to be delivered to the grantee when the grantor should so direct, or the direction is to deliver it at a specified time, unless the order is countermanded, if the circumstances do not make the deed an escrow, the delivery to the stranger will not be sufficient to pass the title.² And although the law presumes that a delivery of a deed to the grantee personally is done with the intention of passing the title, there is no such presumption indulged in when the deed is handed to a stranger. To make the delivery to a stranger effectual, the intention with which the delivery was made must be expressed at the time. There are, however, no formal words or declarations required.³ But where the deed was mailed at the request of the grantee, the deposit

¹ *Doe v. Knight*, 5 B. & C. 671; *Hatch v. Bates*, 54 Me. 139; *Hatch v. Hatch*, 9 Mass. 307; *Marsh v. Austin*, 3 Metc. 412; *O'Kelly v. O'Kelly*, 8 Metc. 439; *Ruggles v. Lawson*, 13 Johns. 285; *Church v. Gilman*, 15 Wend. 656; *Boody v. Davis*, 20 N. H. 140; *Buffum v. Green*, 5 N. H. 71; *Belden v. Carter*, 4 Day, 66; *Stephens v. Rinehart*, 72 Pa. St. 440; *Stephens v. Huss*, 54 Pa. St. 26; *Wesson v. Stevens*, 2 Ired. Eq. 557; *Phillips v. Houston*, 5 Jones L. 302; *Cloud v. Calhoun*, 10 Rich. Eq. 358; *Oliver v. Stone*, 24 Ga. 63; *Mallett v. Page*, 8 Ind. 364; *Stewart v. Weed*, 11 Ind. 92; *Mitchell v. Ryan*, 3 Ohio St. 382; *Morrison v. Kelly*, 22 Ill. 626; *Kingsbury v. Burnside*, 58 Ill. 310; *Cooper v. Jackson*, 4 Wis. 553; *Cecil v. Beaver*, 28 Iowa, 241.

² *Prestman v. Baker*, 30 Wis. 644; *Phila. W. & B. R. R. v. Howard*, 13 How. 334; *Warrall v. Munn*, 1 Seld. 229; *Graves v. Dudley*, 20 N. Y. 76; *Parker v. Parker*, 1 Gray, 409; *Berry v. Anderson*, 22 Ind. 39; *Black v. Shreve*, 13 N. J. 459; *Howe v. Dewing*, 2 Gray, 476; *Dyson v. Bradshaw*, 23 Cal. 528; *Cook v. Brown*, 34 N. H. 476; *Phillips v. Houston*, 5 Jones L. 302; *Millett v. Parker*, 2 Metc. (Ky.) 613; *Shirley v. Ayres*, 14 Ohio, 310; *Fitch v. Bunch*, 30 Cal. 213.

³ *Church v. Gilman*, 15 Wend. 656; *Souverbye v. Arden*, 1 Johns. Ch. 255; *Maynard v. Maynard*, 10 Mass. 456; *Tibbals v. Jacobs*, 31 Conn. 428; *Folk v. Varn*, 9 Rich. Eq. 303; *Mitchell v. Ryan*, 3 Ohio St. 377; *Cecil v. Beaver*, 28 Iowa, 240.

in the post-office was held to be a good delivery.¹ The knowledge and assent of the grantee are just as necessary in this mode of delivery as in the delivery or tender of the deed to the grantee himself, and until acceptance, expressed or presumed, the delivery is inoperative to pass the title.² In New Hampshire it has been held that a deed is revocable by the grantor after delivery until it is accepted by the grantee.³ Delivery and acceptance are "mutual and concurrent acts," and unless the delivery is an open and continuing one an acceptance at a subsequent period will not give validity to the deed.⁴ But the subsequent assent will be good, although the grantor may have died in the meantime.⁵ The assent of the grantee need not always be proved affirmatively and expressly. It may in certain cases be presumed from the delivery. If the grantee was aware of the delivery for his use, and the conveyance was beneficial to him, his assent may be presumed from the time of delivery.⁶ And if it is questioned, it will be necessary to show affirmatively that the grantee was *in esse*, in order to

¹ McKinney v. Rhoades, 5 Watts, 343.

² Young v. Guilbeau, 3 Wall. 636; Jackson v. Bodle, 20 Johns. 184; Wilsey v. Dennis, 44 Barb. 359; Bullitt v. Taylor, 34 Miss. 741; Mallett v. Page, 8 Ind. 364; Boardman v. Dean, 34 Pa. St. 252; Derry Bank v. Webster, 44 N. H. 268; Jackson v. Phipps, 12 Johns. 422; Somers v. Pumphrey, 24 Ind. 243; Berkshire Mut. Fire Ins. Co. v. Sturgis, 13 Gray, 177; Dike v. Miller, 24 Texas, 417; Mitchell v. Ryan, 3 Ohio St. 386; Mills v. Gore, 20 Pick. 28; Stillwell v. Hubbard, 20 Wend. 44.

³ Derry Bank v. Webster, 44 N. H. 268; Johnson v. Farley, 45 N. H. 509.

⁴ Jackson v. Dunlap, 1 Johns. Cas. 114; Jackson v. Bodle, 20 Johns. 187; Church v. Gilman, 15 Wend. 656; Canning v. Pinkham, 1 N. H. 353; Buffum v. Green, 5 N. H. 71; Hulick v. Scovil, 9 Ill. 177.

⁵ Hatch v. Hatch, 9 Mass. 307; Foster v. Mansfield, 3 Metc. 412; O'Kelly v. O'Kelly, 8 Metc. 439; Stephens v. Huss, 54 Pa. St. 26; Shaw v. Hayward, 7 Cush. 175; Mather v. Corless, 103 Mass. 568. But see State Bank v. Evans, 3 Green, 155.

⁶ Robinson v. Gould, 26 Iowa, 93; Cecil v. Beaver, 28 Iowa, 241. But an acceptance will not be presumed, as long as the grantee is ignorant of the conveyance. Maynard v. Maynard, 10 Mass. 456; Prestman v. Baker, 30 Wis. 644; Baker v. Haskell, 47 N. H. 479; Thompson v. Lloyd, 49 Pa. St. 128.

support the presumption of acceptance.¹ But this presumption in reference to the assent of the grantee is only *prima facie*. If the grantee actually dissents, of course no title passes.² But where the grantee is under disabilities, as in the case of infant grantees, and perhaps married women, the presumption of assent to a beneficial conveyance becomes a *rule of law*, and knowledge of the conveyance and delivery is not essential.³ The relation existing between the person receiving the deed and the grantee may often make the assent and acceptance of the deed by the former sufficient to give the title to the grantee. For example, an acceptance by the father or mother of a deed to an infant child is a good acceptance.⁴ And on the same ground at common law, a conveyance to a married woman was void if her husband dissented. But his assent is binding upon her even after his death.⁵

§ 815. **Escrows.** — Although the delivery of the deed will pass the title, if such is the intention of the grantor, and such intention will be presumed in the absence of anything to the contrary, yet there may be a conditional delivery, conditioned that the deed shall only take effect upon the happening of an event specified at the time of delivery.

¹ *Hulick v. Scovil*, 9 Ill. 177; *Walker v. Walker*, 42 Ill. 311; *Bensley v. Atwill*, 12 Cal. 231.

² *Peavey v. Tilton*, 18 N. H. 152; *Townson v. Tickell*, 3 B. & Ald. 36; *Younge v. Guilbeau*, 3 Wall. 641; *Tompkins v. Wheeler*, 16 Pet. 119; *Read v. Robinson*, 6 Watts & S. 329; *Fonda v. Sage*, 46 Barb. 109; *Welsh v. Sackett*, 12 Wis. 243; *Rogers v. Carey*, 47 Mo. 232; *Dikes v. Miller*, 24 Texas, 423.

³ *Baker v. Haskell*, 47 N. H. 479; *Spencer v. Carr*, 45 N. Y. 410; *Gregory v. Walker*, 38 Ala. 26; *Rivard v. Walker*, 39 Ill. 413; *Cecil v. Beaver*, 28 Iowa, 241; *Mitchell v. Ryan*, 3 Ohio St. 387; *Peavey v. Tilton*, 18 N. H. 152; *Concord Bank v. Bellis*, 10 Cush. 378.

⁴ *Baker v. Haskell*, 47 N. H. 479; *Souverby v. Arden*, 1 Johns. Ch. 456; *Jaques v. Methodist Church*, 17 Johns. 577; *Gregory v. Walker*, 38 Ala. 26; *Bryan v. Wash*, 6 Ill. 557; *Morrison v. Kelly*, 22 Ill. 612; *Rogers v. Carey*, 47 Mo. 236; *Cloud v. Calhoun*, 10 Rich. Eq. 362.

⁵ *Butler & Baker's Case*, 3 Rep. 26; *Melvin v. Prop'rs, etc.*, 16 Pick. 167; *Foley v. Howard*, 8 Clarke (Iowa) 36.

Such a deed is called an *escrow*. In order that a deed may be an *escrow*, it must be delivered to a stranger to hold until the condition is performed, and then to be delivered to the grantee. If the delivery is made to the grantee, it will be an absolute delivery, whatever conditions may be annexed thereto, and the title will immediately pass to the grantee.¹ But if the delivery to the grantee is merely for the purpose of having it delivered immediately to a third person to hold as an *escrow*, the delivery to the grantee will not vest a title in him, the intent, with which it was done, controlling its effect.² Where the deed is delivered to a stranger for the grantee, whether it shall operate as a present deed, or as an *escrow*, depends upon the intention of the parties, as expressed at the time of delivery. If the deed is handed to the stranger with the instruction that the delivery to the grantee shall depend upon the happening of a condition, it is an *escrow*; but if the delivery is made to the stranger, although accompanied by instructions that it shall not be delivered until the death of the grantor, it is a grant *in præ-senti*.³ The importance of distinguishing *escrows* from other deeds like those above described lies in this fact: *Escrows* can operate only from the time that the condition is performed. A delivery before the performance of the condition will not

¹ Fairbanks v. Metcalf, 8 Mass. 230; Ward v. Lewis, 4 Pick. 520; Gilbert v. N. A. F. Ins. Co., 23 Wend. 43; Worrall v. Munn, 6 N. Y. 229; Black v. Shreve, 13 N. J. 458; Lawton v. Sager, 11 Barb. 349; Moss v. Riddle, 5 Cranch, 351; Cin., W. & Z. R. R. v. Iliff, 13 Ohio St. 249; M. & Ind. Plank Road Co. v. Stevens, 10 Ind. 1; State v. Chrisman, 2 Ind. 126; Foley v. Cowgill, 5 Blackf. 18; Blake v. Fash, 44 Ill. 305; Jane v. Gregory, 42 Ill. 416; Herdman v. Bratten, 2 Harr. 396; Fireman's Ins. Co. v. McMillan, 29 Ala. 160. But see Bibb v. Reid, 3 Ala. 88.

² Murray v. Stair, 2 B. & C. 82; Jackson v. Sheldon, 22 Me. 569; Gilbert v. N. A. Fire Ins. Co., 23 Wend. 43; Simonton's Estate, 4 Watts, 180; Den v. Partee, 2 Dev. & B. 530. But see Fairbanks v. Metcalf, 8 Mass. 239; Braman v. Bingham, 26 N. Y. 483.

³ Foster v. Mansfield, 3 Metc. 414; Cook v. Brown, 34 N. H. 465; Tooley v. Dibble, 2 Hill, 641; Braman v. Bingham, 26 N. Y. 483; Hathaway v. Payne, 34 N. Y. 106; Price v. P. & Ft. W. & C. R. R., 34 Ill. 13.

have the effect of passing the title to the grantee, not even against innocent purchasers for value of the grantee.¹ But if the deed is one operating immediately, even though the bailee of the deed is instructed not to deliver it before the grantor's death, it passes the title immediately, and a delivery before the grantor's death will be good. Indeed, it does not seem that any formal delivery to the grantee is required.² For this reason it is always necessary in delivering a deed as an escrow to be explicit as to the intent with which the delivery was made, and it would be much more prudent if the delivery is accompanied by a memorandum in writing, explaining the character of the delivery to the bailee, and the terms of the condition upon which the delivery to the grantee depends. No technical or formal language is required, provided the intention is made clear by the use of any other language.³ In an escrow no title vests in the grantee until the second delivery.⁴ But though the deed after the first delivery can only be revoked by the grantor for default in the performance of the condition,⁵ the prem-

¹ *Fairbanks v. Metcalf*, 8 Mass. 230; *Souverbye v. Arden*, 1 Johns. Ch. 240; *Hinman v. Booth*, 21 Wend. 267; *People v. Bostwick*, 32 N. Y. 450; *Stiles v. Brown*, 16 Vt. 563; *Smith v. So. Royalton Bk.*, 32 Vt. 241; *Black v. Shreve*, 13 N. J. 458; *Jackson v. Sheldon*, 22 Me. 569; *Blight v. Schenck*, 10 Pa. St. 285; *Berry v. Anderson*, 22 Ind. 40; *Illinois Cent. R. R. v. McCullaugh*, 59 Ill. 170; *Chipman v. Tucker*, 38 Wis. 43; 20 Am. Rep. 1. In *Rhodes v. Gardiner*, 30 Me. 110, it was held that sufficient title passed by such an unauthorized delivery to give a good title to an innocent purchaser from the grantee.

² *Murray v. Stair*, 2 B. & C. 82; *Shaw v. Hayward*, 7 Cush. 175; *Foster v. Mansfield*, 3 Metc. 412; *O'Kelly v. O'Kelly*, 8 Metc. 436; *Mather v. Corless*, 103 Mass. 568; *Braman v. Bingham*, 26 N. Y. 483; *Hathaway v. Payne*, 34 N. Y. 106; *Price v. P., & Ft. W. & C. R. R.*, 34 Ill. 13.

³ *Jackson v. Catlin*, 2 Johns. 248; *Clark v. Gifford*, 10 Wend. 310; *Gilbert v. N. A. Fire Ins. Co.*, 23 Wend. 43; *Fairbanks v. Metcalf*, 8 Mass. 230; *Jackson v. Sheldon*, 22 Me. 569; *State v. Peck*, 53 Mo. 293; *White v. Bailey*, 14 Conn. 271; *Shoenberger v. Hackman*, 37 Pa. St. 87; *Millett v. Parker*, 2 Metc. (Ky.) 616.

⁴ *Frost v. Beekman*, 1 Johns. Ch. 297; *James v. Vanderheyden*, 1 Paige, 385; *Everts v. Agnes*, 4 Wis. 351.

⁵ *Worrall v. Munn*, 6 N. Y. 229; *Millett v. Parker*, 2 Metc. (Ky.) 608; *Wright v. Shelby R. R.*, 16 B. Mon. 4.

ises so far continue to be the property of the grantor that they can be levied upon by the grantor's creditors, and their attachments will take precedence to the title acquired by the grantee.¹ But notwithstanding the deed does not take effect until the second delivery, yet for many purposes, after the second delivery, the deed relates back to the first delivery, and takes effect *nunc pro tunc*. This is the case when the doctrine of relation is necessary on account of some intervening obstacle which would otherwise invalidate the deed, as where the grantor dies before the second delivery.²

§ 816. **Registration.** — Except in respect to the enrollment of deeds of bargain and sale, deeds were not required by the English law to be registered or recorded. And, although a system of registration has been in operation since the reign of Queen Anne in some of the counties of England, no general registration law has ever been in force there.³ But in the United States from an early period, every State in the Union has had a general registration law and officers appointed, whose duty it was to record all deeds of conveyance, and other written instruments mentioned in the statute. The object of recording a deed is to furnish a subsequent purchaser with reliable means of investigating titles. The recording of a deed is not essential to its validity as between the parties and all others having any other actual or constructive notice of it. If a subsequent purchaser has notice of a prior unrecorded deed, or if he is a voluntary purchaser, the prior deed will be a good conveyance against

¹ *Frost v. Beekman*, 1 Johns. Ch. 297; *Jackson v. Catlin*, 2 Johns. 248; *Jackson v. Rowland*, 6 Wend. 666.

² *Ruggles v. Lawson*, 13 Johns. 285; *Jackson v. Rowland*, 6 Wend. 666; *Shirley v. Ayres*, 14 Ohio, 307; *Price v. P., Ft. W. & C. R. R.*, 34 Ill. 34; *Evans v. Gibbs*, 6 Humph. 405; *Hall v. Harris*, 5 Ired. Eq. 303; *Frost v. Beekman*, 1 Johns. Ch. 257; *Jackson v. Catlin*, 2 Johns. 248; *Hatch v. Hatch*, 9 Mass. 307; *Carr v. Hoxie*, 5 Mason, 60.

³ 3 Washb. on Real Prop. 313; Williams on Real Prop. 466, 467.

him.¹ The record simply furnishes evidence of the conveyance, and the law provides that if a deed is recorded, the record is constructive notice of the conveyance, and that an unrecorded deed shall not prevail against subsequent purchasers without notice. If notice of the conveyance is obtained in any other way the deed will be as valid as if it was recorded.² And notice after the delivery of the deed, but before the payment of the consideration, will be sufficient notice to give precedence to the prior unrecorded deed.³ But in order that the record may be constructive notice of the deed and its contents, the deed must be a valid one, and possess all the requisites of a valid deed. The record of a defective deed furnishes no notice even to one who has seen it. And the deed or other instrument must further be one required or permitted by law to be recorded.⁴ Generally

¹ *Hill v. Epley*, 31 Pa. St. 335; *Barney v. McCarty*, 15 Iowa, 514; *Galland v. Jackman*, 26 Cal. 87; *Shotwell v. Harrison*, 22 Mich. 410; *Dixon v. Lacoste*, 1 Smed. & M. 107; *Wilkins v. May*, 3 Head, 176; *Maupin v. Emmons*, 47 Mo. 306; *Patterson v. Dela Ronde*, 8 Wall. 300; *Morrison v. Kelly*, 22 Ill. 610; *Jamaica Pond v. Chandler*, 9 Allen, 169; *Speer v. Evans*, 47 Pa. St. 144; *Belk v. Massey*, 11 Rich. 614; *Ellison v. Wilson*, 36 Vt. 67.

² *Earle v. Fiske*, 103 Mass. 492; *Trull v. Bigelow*, 16 Mass. 406; *Stephens v. Morse*, 47 N. H. 433; *Murphy v. Nathans*, 46 Pa. St. 512; *King v. Gilson*, 32 Ill. 654; *Sicard v. Davis*, 6 Pet. 124; *Irvin v. Smith*, 17 Ohio, 226; *Van Rensselaer v. Clark*, 17 Wend. 25; *Jackson v. Leek*, 19 Wend. 339; *Corliss v. Corliss*, 8 Vt. 373; *Wells v. Morrow*, 38 Ala. 125; *Martin v. Quattlebaum*, 3 McCord, 205; *Rogers v. Jones*, 8 N. H. 264; *Burkhalter v. Ector*, 25 Ga. 55; *Ricks v. Reed*, 19 Cal. 571; *Lillard v. Rucker*, 9 Yerg. 64; *Dixon v. Doe*, 1 Smed. & M. 70; *Givan v. Doe*, 7 Blackf. 210; *Applegate v. Gracy*, 9 Dana, 224; *Hopping v. Burnham*, 2 Greene (Iowa), 39; *Fitzhugh v. Barnard*, 12 Mich. 110.

³ *Blanchard v. Tyler*, 12 Mich. 339.

⁴ *De Witt v. Moulton*, 17 Me. 418; *Shaw v. Poor*, 6 Pick. 88; *Blood v. Blood*, 23 Pick. 80; *Graves v. Graves*, 6 Gray, 391; *Isham v. Bennington Co.*, 19 Vt. 230; *Peck v. Mallams*, 10 N. Y. 518; *Carter v. Champion*, 8 Conn. 549; *Meighen v. Strong*, 6 Miss. 177; *Kerns v. Swope*, 2 Watts, 75; *McKean v. Mitchell*, 35 Pa. St. 269; *Bossard v. White*, 9 Rich. Eq. 483; *Harper v. Barsh*, 10 Rich. Eq. 149; *Harper v. Tapley*, 35 Miss. 510; *Herndon v. Kimball*, 7 Ga. 432; *Burnham v. Chandler*, 15 Texas, 441; *Stevens v. Hampton*, 46 Mo. 408; *Bishop v. Schneider*, 46 Mo. 472; 2 Am. Rep. 533; *Ely v. Wilcox*, 20 Wis. 529;

an unrecorded deed will be good against subsequently attaching creditors, as well as against subsequent purchasers with notice. But in several of the States, under their local law, a deed must be recorded to be good against creditors.¹ If a deed has been properly recorded, in most of the States it may be used in evidence without any other proof of its execution.² And in some of them a certified copy of the record is made original evidence in establishing the claim of title from one grantor to another.³ But in other of the States the deed must be proved as at common law, unless it comes under the head of *ancient deeds*, *i.e.*, deeds thirty years old.

§ 817. **To whom and of what is record constructive notice.**—This record is constructive notice to only subsequent purchasers claiming under the grantor, *i.e.*, those who acquire an interest in the property subsequently, and as privy to the grantor, whether as grantee, mortgagee, or at-

Pringle v. Dunn, 37 Wis. 449; 19 Am. Rep. 772; Stewart v. McSweeney, 14 Wis. 468. In Musgrove v. Bouser, (5 Oreg. 313; 20 Am. Rep. 737), the Supreme Court of Oregon held that the record of a deed, not properly admitted to record, furnishes constructive notice of the contents of the deed to all who have actually seen the record. It is also a general rule that the record must be properly made, in order to raise constructive notice to subsequent purchasers; and it has been held in Wisconsin, though denied in Missouri and Pennsylvania, that a record without an index furnishes no notice. Pringle v. Dunn, 37 Wis. 449; 19 Am. Rep. 772; Bishop v. Schneider, 46 Mo. 472; 2 Am. Rep. 553; Schell v. Stein, 76 Pa. St. 398; 18 Am. Rep. 416.

¹ Guerrant v. Anderson, 4 Rand. 208; Lillard v. Rucker, 9 Yerg. 64; Ring v. Gray, 6 B. Mon. 368.

² Younge v. Guilbeau, 3 Wall. 640; Houghton v. Jones, 1 Wall. 702; Carpenter v. Dexter, 8 Wall. 532; Ball v. McCawley, 29 Ga. 355; Hutchinson v. Rust, 2 Gratt. 394; Doe v. Prettyman, 1 Houst. 339; Samuels v. Borrowscale, 104 Mass. 207; Simpson v. Mundy, 3 Kan. 181; Young v. Ringo, 1 B. Mon. 30; Clark v. Troy, 20 Cal. 219; Fell v. Young, 63 Ill. 106; Sanders v. Bolton, 26 Cal. 405; Hinchliffe v. Hinman, 18 Wis. 135; Toulmin v. Austin, 5 Stew. & P. 410.

³ Scanlan v. Wright, Samuels v. Borrowscale, 104 Mass. 207; Harvey v. Mitchell, 31 N. H. 582; Farrar v. Fessenden, 39 N. H. 268; Dixon v. Doe, 5 Blackf. 103; Bogan v. Frisby, 36 Miss. 178.

taching creditor.¹ It is not notice to those who claim independently of the grantor, or acquire their interest from the grantor by a prior deed.² It has been held by some of the courts that a purchaser from the heir cannot claim precedence for his recorded deed over the unrecorded deed of the ancestor, on the ground that since the unrecorded deed was a good conveyance against the heir, nothing descended to the heir which he could convey.³ But the better opinion seems to be that the deed from the heir in such a case would be entitled to priority, and would vest the superior title in the grantee of the heir, for the reason that the registry laws declare a deed void against all subsequent purchasers without notice if it has not been recorded.⁴ If one has a recorded deed which has a priority over an antecedent unrecorded deed, the holder of the recorded deed acquires an absolute paramount title, which he can convey even to those who have notice of the prior unrecorded deed.⁵ And if the recorded deed is to one who has notice of the prior deed, although in his hands the recorded deed does not have precedence, if he conveys to one having no notice, his grantee acquires a good title. But if the prior deed is recorded before the conveyance by the first grantee who has had notice, the grantee of the second conveyance is bound by

¹ *Tilton v. Hunter*, 24 Me. 35; *Shaw v. Poor*, 6 Pick. 85; *Bates v. Norcross*, 14 Pick. 224; *Flynt v. Arnold*, 2 Metc. 619; *Doe v. Beardsley*, 2 McLean, 412; *Whittington v. Wright*, 9 Ga. 23; *Miller v. Bradford*, 12 Iowa, 18; *Crockett v. Maguire*, 10 Mo. 34; *Losey v. Simpson*, 3 Stockt. Ch. 246; *Ely v. Wilcox*, 20 Wis. 530.

² *George v. Wood*, 9 Allen, 80; *Losey v. Simpson*, 3 Stockt. Ch. 246; *Holley v. Hawley*, 39 Vt. 532.

³ *Hill v. Meeker*, 24 Conn. 211; *Hancock v. Beverly*, 6 B. Mon. 532; *Harlan v. Seaton*, 18 B. Mon. 312.

⁴ *Earle v. Fiske*, 103 Mass. 491; *Powers v. McFerron*, 2 Serg. & R. 47; *McCulloch v. Endaly*, 3 Yerg. 346; *Youngblood v. Vastine*, 46 Mo. 239; *Kennedy v. Northrup*, 15 Ill. 148.

⁵ *Lowther v. Carlton*, 2 Atk. 139; *Trull v. Bigelow*, 16 Mass. 406; *Bumpus v. Platner*, 1 Johns. Ch. 219; *Bell v. Twilight*, 18 N. H. 159.

the constructive notice.¹ Not only is the record constructive notice of the recorded deed and its contents, but it will also be notice of all other deeds and their contents, to which reference is made in the recorded deed.² But the record is constructive notice of the contents of the deed only as they appear upon the record. A mistake of the register in the description of the property, or the amount of the mortgage, will fall upon the holder of the deed.³ And in some States a failure to index the deed will deprive the record of the constructive notice.⁴ But no one can take advantage of the record for the purpose of giving his deed priority over another unrecorded deed, who has not paid a substantial valuable consideration therefor, and he must show by extraneous evidence that it has been paid.⁵

§ 818. **From what time does priority take effect.** — As a general proposition, in the absence of special rules, the priority acquired by the registration takes effect from the date of the record.⁶ And the date of the record is taken at the time when the deed was deposited for registration.⁷ But in some of the States the recording law provides that if a

¹ *Flynt v. Arnold*, 2 Metc. 619; *Trull v. Bigelow*, 16 Mass. 406; *Adams v. Cuddy*, 13 Pick. 460; *Bracket v. Ridlon*, 54 Me. 434; *Hagthorp v. Hook*, 1 Gill & J. 270; *Baylis v. Young*, 51 Ill. 127.

² *White v. Foster*, 102 Mass. 375; *Gilbert v. Peteler*, 38 N. Y. 165; *Aeer v. Westcott*, 46 N. Y. 384; *Cambridge Valley Bank v. Delano*, 48 N. Y. 326; *Hamilton v. Nutt*, 34 Conn. 501; *Baker v. Matcher*, 25 Mich. 53.

³ *Frost v. Beekman*, 1 Johns. Ch. 299; *Beekman v. Frost*, 18 Johns. 544. See *ante*, sect. 338.

⁴ *Pringle v. Dunn*, 37 Wis. 449; 19 Am. Rep. 772; *Barney v. McCarty*, 15 Iowa, 522; *Whatley v. Small*, 25 Iowa, 188. *Contra*, *Bishop v. Schneider*, 46 Mo. 472; 2 Am. Rep. 533; *Schell v. Stein*, 76 Pa. St. 398; 18 Am. Rep. 416.

⁵ *Boone v. Chiles*, 10 Pet. 211; *Watkins v. Edwards*, 23 Texas, 447; *Parker v. Foy*, 43 Miss. 260; *Maupin v. Emmons*, 47 Mo. 304; *Bishop v. Schneider*, 46 Mo. 472; 2 Am. Rep. 533; *Shotwell v. Harrison*, 22 Mich. 410.

⁶ 4 Kent's Com. 457; *Cushing v. Hurd*, 4 Pick. 252; *Goodsell v. Sullivan*, 40 Conn. 83.

⁷ *Den v. Richman*, 1 Green (N. J.), 52; *Nichols v. Reynolds*, 1 R. I. 30; *Horsley v. Garth*, 2 Gratt. 471; *Bigelow v. Topliff*, 25 Vt. 274; *Warnock v. Wightman*, 1 Brev. 331; *Hine v. Robbins*, 8 Conn. 347; *Gill v. Fauntleroy*, 3 B. Mon. 177.

deed is recorded within the time allowed by law, it relates back to the time of delivery of the deed, and has priority over a subsequently executed deed which has been previously recorded. Statutory provisions of this character are to be found in Ohio, Kentucky, Mississippi, Georgia, South Carolina, Pennsylvania, Alabama, Indiana, Delaware, Tennessee, and Maryland.¹ The time allowed for recording varies with the different States. If in these States a deed has been recorded after the expiration of the time allowed by law, the record gives constructive notice from the time of the record, but does not relate back to the time of delivery.²

§ 819. **What constitutes sufficient notice of title — Possession.**— As has been already stated, not only is an unrecorded deed good against the grantor, his heirs, devisees, and subsequent voluntary grantees, but it is also good against subsequent purchasers for value, if they are charged with notice of the prior deed. In order to bind a subsequent purchaser with notice, he must have actual notice of the deed, or knowledge of such facts which would set a prudent man upon his inquiry, and as a deduction from this rule, the law imputes to a purchaser a knowledge of every fact which appears upon the muniments of title, or which one should inquire after in the investigation of the title.³ Thus,

Kessler v. State, 24 Ind. 315; *Quirk v. Thomas*, 6 Mich. 76; *Harrold v. Simonds*, 9 Mo. 326; *Davis v. Ownsby*, 14 Mo. 175; *McRaven v. McGuire*, 9 Smed. & M. 34; *Dubose v. Young*, 10 Ala. 365; *McCabe v. Gray*, 20 Cal. 509.

¹ 3 Washl. on Real Prop. 320, 321.

² *Walk. Am. Law* 358; *McRaven v. McGuire*, 9 Smed. & M. 39; *Leger v. Doyle*, 11 Rich. L. 109; *Anderson v. Dugas*, 29 Ga. 440; *Lightner v. Mooney*, 10 Watts, 407; *Souder v. Morrow*, 33 Pa. St. 83; *Den v. Richman*, 1 Green (N. J.), 43; *Mallory v. Stodder*, 6 Ala. 801; *Helms v. O'Bannon*, 26 Ga. 132; *Belk v. Massey*, 11 Rich. L. 614; *Northrup v. Brehmer*, 8 Ohio, 392; *Poth v. Anstatt*, 4 Watts & S. 307.

³ *Mills v. Smith*, 3 Wall, 33; *Jackson v. Livingston*, 10 Johns. 374; *Mau-pin v. Enmons*, 47 Mo. 306; *Brush v. Ware*, 15 Pet. 93; *Jumel v. Jumel*, 7 Paige, 591; *Burch v. Carter*, 44 Ala. 115; *Fitzhugh v. Barnard*, 12 Mich. 110; *Daughaday v. Paine*, 6 Minn. 452; *Reeder v. Barr*, 4 Ohio, 446; *Mason v. Payne*, *Walk. Ch.* 459; *Baltimore, etc., v. White*, 2 Gill, 444.

a deed in the chain of title discovered by the investigator is constructive notice of all other deeds referred to in the deed which was discovered.¹ And the notice that the grantor had made a prior deed of the same land is sufficient, although the purchaser knew nothing of its contents.² Notice to a general agent or trustee is notice to the principal or *cestui que trust*.³ It is also generally held in the United States that possession of the grantee under a prior unrecorded deed is constructive notice of the title under which he claims.⁴ But in some of the States it is held that such possession is not to be considered conclusive evidence of notice. The second grantee may show in rebuttal that he made a diligent but unsuccessful inquiry.⁵ And in order that possession may raise a constructive notice of title, it must be open, notorious, and unequivocal. A joint possession with the grantor, or one which is rendered ambiguous from any other cause, will not be sufficient.⁶

¹ *Aer v. Westcott*, 46 N. Y. 384; *Cambridge Valley Bank v. Delano*, 48 N. Y. 326; *Hamilton v. Nutt*, 34 Conn. 501; *Baker v. Matcher*, 25 Mich. 53.

² *Galland v. Jackman*, 26 Cal. 87.

³ *Myers v. Ross*, 3 Head, 59.

⁴ *Lea v. Polk Co. Copper Co.*, 21 How. 493; *Helms v. May*, 29 Ga. 121; *Watkins v. Edwards*, 23 Texas, 443; *Harper v. Perry*, 28 Iowa, 62; *Russell v. Sweesey*, 22 Mich. 239; *Morrison v. Kelly*, 22 Ill. 610; *Maupin v. Emmons*, 47 Mo. 307; *Hunter v. Watson*, 12 Cal. 303; *Coleman v. Barklew*, 3 Dutch. 357; *Watrous v. Blair*, 32 Iowa, 63; *Berg v. Shipley*, 1 Grant's Cas. 429; *Billington v. Welsh*, 5 Binn. 129; *McKinzie v. Perrill*, 15 Ohio St. 168; *Shumate v. Reavis*, 49 Mo. 333; *Burt v. Cassety*, 12 Ala. 134.

⁵ *Pomroy v. Stevens*, 11 Metc. 244; *Dooley v. Wolcott*, 4 Allen, 406; *Mara v. Pierce*, 9 Gray, 306; *Nutting v. Herbert*, 37 N. H. 346; *Moore v. Jourdan*, 14 La. An. 414; *Lestrade v. Barth*, 19 Cal. 676; *Fair v. Stevenot*, 29 Cal. 490.

⁶ *Billington v. Welsh*, 5 Binn. 129; *Colby v. Kenniston*, 4 N. H. 262; *Patton v. Moore*, 32 N. H. 384; *Truesdale v. Ford*, 37 Ill. 210; *Fair v. Stevenot*, 29 Cal. 490; *Smith v. Yale*, 31 Cal. 184.

SECTION II.

COMPONENT PARTS OF A DEED.

- SECTION 824.** Deeds-poll and of indenture.
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§ 824. **Deeds-poll and of indenture.** — After explaining the requisites of a deed to convey land, it is necessary to present the formal and component parts. But before proceeding to the discussion of them in their regular order, reference must be made to the two kinds of deeds known to the law, and differing in form, viz. : deeds of indenture, and deeds-poll. A deed of indenture is a deed consisting of as many parts as there are parties. Originally, these parts, or copies, were written on the same piece of paper or parchment, and for the purpose of identifying the several

parts, they were cut apart in an irregular line, somewhat resembling the teeth of a saw, *instar dentium*, some word having been written over the proposed line of severance. It is from this quaint method of execution that the name *indenture* is derived. But this practice is rarely, if ever, followed now, and a deed of indenture means simply a deed executed by all the parties, and consisting of as many parts or copies as there are parties. Formerly, it was customary for each party to execute only one and a different part, and the part executed by the grantor was called the *original*, while that which was executed by the grantee was called the *counterpart*. But now it is usual for both parties to execute each part.¹ A deed-poll is designed simply to transfer the grantor's interest, and is executed by him alone.² Deeds-poll are in the first person, while deeds of indenture are in the third person. But this is a mere formality, the non-observance of which will not invalidate the deed; and, although the deed is in form one of indenture, it will be good as a deed-poll, if the grantor executes it alone.³ Indeed, the distinction is of very little practical value. Although it is said that a deed of indenture is a stronger deed for raising an estoppel against the grantee,⁴ yet a deed-poll can and does raise all the estoppels necessary for the protection of the grantor's interests, and by accepting the deed-poll the grantee takes the estate so granted, subject to all the conditions, exceptions, reservations, and conditions contained in the deed. If the deed is to operate as a deed of exchange, or one of partition, all parties must join in the execution of the deed, and the deed must be an indenture, since in those cases each party

¹ 3 Washb. on Real Prop. 311; Co. Lit. 229 a, Butler's note, 140; Dyer v. Sanford, 9 Metc. 395; Dudley v. Sumner, 5 Mass. 438.

² 3 Washb. on Real Prop. 311; Dyer v. Sanford, 9 Metc. 395; Giles v. Pratt, 2 Hill (S. C.) 439.

³ 3 Washb. on Real Prop. 312; Hallett v. Collins, 10 How. 174; Hipp v. Hackett, 4 Texas, 20.

⁴ 3 Washb. on Real Prop. 312; Finley v. Simpson, 2 N. J. 311.

is, successively, and in respect to his estate thus conveyed, a grantor. There is a technical difference between deeds-poll and deeds of indenture still prevailing, in respect to the form of action upon the grantee's covenants. In some of the States, where the common-law pleading still prevails, it is held that the action of the grantor's covenant in a deed-poll must be *assumpsit*, since his agreement or contract is not one under his seal. And no doubt this is the correct view.¹ But in the so-called code States, viz., where the common-law pleading has been supplanted by the New York code of procedure, this distinction has passed away with the abolition of all forms of actions.²

§ 825. **Component parts of a deed.** — These parts have been divided and named by Lord Coke as follows: the premises, *habendum*, *tenendum*, *reddendum*, condition, warranty, and covenants. And although it is advisable, *ex abundante cautela*, to follow the form and order here prescribed, making use of the technical and thoroughly adjudicated phraseology, it is not absolutely necessary. If a deed contains all the requisites hereinbefore explained, it will be a good and effective deed, even though the various elements are presented in the most irregular order, and in the most informal language. The premises is the only essential part of a deed for the conveyance of an estate.³

§ 826. **The premises.** — The term, *premises*, is given to all that part of a deed which precedes the *habendum* clause, and generally includes the names of the parties, the recitals which may be necessary to an explanation of the deed and

¹ *Goodwin v. Gilbert*, 9 Mass. 510; *Nugent v. Riley*, 1 Metc. 117; *Newell v. Hill*, 2 Metc. 180; *Hinsdale v. Humphrey*, 15 Conn. 431; *Johnson v. Massy*, 45 Vt. 419; *Maule v. Weaver*, 7 Pa. St. 829.

² *Atlantic Dock Co. v. Leavett*, 54 N. Y. 34.

³ 3 Washb. on Real Prop. 365; Co. Lit. 6 a, 7 a; 4 Kent's Com. 461; *Roe v. Tramarr*, Willes, 682.

its operation, the consideration and receipt of the same, the operative words of conveyance, description of the thing granted, and, if it is a deed of indenture, the date.¹ But these may appear in other parts of the deed, and will be equally effective. And it has been held that where the premises do not contain the name of the grantee, or even sufficient operative words of conveyance, these may be supplied by the *habendum*.² This is but an application of the general principle, already enunciated, that a logical or systematic arrangement of the parts is not essential. All the elements of the premises have been already fully discussed, except the matter of description of land granted, and nothing further need be said here concerning them. We will, therefore, proceed to a discussion of the description.

§ 827. **Description — General statement.** — At first blush, it would appear easy enough to describe specifically and clearly what is granted, and if extreme caution was observed in every case, in framing the description, there would be little need of rules of construction. For a clearly written description can never be controlled by parol evidence.³ But at times so little precaution is taken, and so many uncertainties and inconsistencies creep in, that resort must be made to established rules of construction in order to ascertain the intention of the parties. And in construing a deed, very little attention, if any, is paid to the punctuation of the description.⁴ If a description is hopelessly uncertain, so that the thing granted cannot be ascertained from the deed with any reasonable degree of certainty, the deed will

¹ 3 Washb. on Real Prop. 366.

² 3 Washb. on Real Prop. 366; *post*, sect. 844.

³ Broom's Leg. Max. 477; *Cole v. Lake Co.*, 54 N. H. 278; *Hannum v. West Chester*, 70 Pa. St. 372.

⁴ 3 Washb. on Real Prop. 397; *Doe v. Martin*, 4 T. R. 65; *Ewing v. Burnett*, 11 Pet. 54.

be void.¹ But if it is possible to gather the intention from the description by any reasonable rules of construction, it will be enforced.² And in applying these rules of construction on the assumption, particularly in a deed-poll, that the deed is in the language of the grantor, and he is in fault, if uncertainties or inconsistencies arise, the deed is construed most favorably to the grantee. But this is only done when all other rules fail to remove the doubt.³ Another fundamental principle is that a rational intention must be sought after. The construction must be reasonable and consistent with common sense.⁴ In order to ascertain the intention, it is sometimes necessary that resort should be had to parol evidence. But this can only be done when there is some uncertainty arising outside of the deed. Then parol evidence is admissible to explain the ambiguities arising in this manner by showing the circumstances surrounding the parties, explaining words of art, and by proof of any other facts which will tend to render certain the intentions of the parties.⁵ But when the deed contains everything necessary for a correct understanding of the intention of the parties, and there is, therefore, no uncertainty or ambiguity, parol evidence cannot control the construction.⁶

¹ *Presbrey v. Presbrey*, 13 Allen 283; *Walters v. Breden*, 70 Pa. St. 238; *Shackleford v. Bailey*, 35 Ill. 391; *Wofford v. McKinna*, 23 Texas, 45; 3 Washb. on Real Prop. 381.

² *Abbott v. Abbott*, 51 Me. 582; *Bond v. Fay*, 12 Allen, 88; *Crafts v. Hibbard*, 4 Metc. 452.

³ *Worthington v. Hylyer*, 4 Mass. 205; *Clough v. Bowman*, 15 N. H. 504; *Sanborn v. Clough*, 40 N. H. 330; *Marshall v. Niles*, 8 Conn. 469; *Carroll v. Norwood*, 5 Har. & J. 155; *Dodge v. Walley*, 22 Cal. 228; *Vance v. Fore*, 24 Cal. 446.

⁴ *Lyman v. Arnold*, 5 Mason, 198; *Day v. Adams*, 42 Vt. 510; *Magoon v. Harris*, 46 Vt. 271.

⁵ *Shore v. Wilson*, 9 Cl. & Fin. 556; *Eaton v. Smith*, 20 Pick. 150; *Putnam v. Bond*, 100 Mass. 58; *Hall v. Davis*, 36 N. H. 569; *Hildebrand v. Fogle*, 20 Ohio, 147; *Stanley v. Green*, 12 Cal. 162.

⁶ *Bond v. Fay*, 12 Allen, 88; *Caldwell v. Fulton*, 31 Pa. St. 489; *Morrison v. Wilson*, 30 Cal. 347; *Lippett v. Kelly*, 46 Vt. 516.

Where the deed, upon a reasonable construction, conveys other property, or imposes other restrictions or conditions than were intended by the parties, the courts, more particularly those of equity, are authorized, either by statute or under the general equitable jurisdiction, to reform it, so as to conform to the intention of the parties.¹ But the reformation must be necessary to effectuate the intention of the parties. It will not be ordered where the uncertainty may be removed by the application of well-known rules of construction.² Nor will a deed be reformed because the parties have mistaken the legal operation of the deed.³ But reformation of instruments is a branch of equity jurisprudence, and does properly belong to a work on Real Property. Suffice it to say that, until it is reformed, an absolutely defective deed conveys nothing.

§ 828. *Contemporanea expositio est optima et fortissima in lege.* — In construing deeds, courts endeavor to place themselves in the position of the parties at the time of the conveyance, in order to ascertain what is intended to be conveyed. For, in describing the property, parties are presumed to refer to its condition at that time, and the meaning of their terms of expression can only be properly understood by a knowledge of their position and that of the property conveyed.⁴ Thus, where the channel of a stream, running through a tract of land, was changed by the pro-

¹ *Metcalf v. Putnam*, 9 Allen, 97; *Canedy v. Marcy*, 14 Gray, 373; *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 317; *Adams v. Stevens*, 49 Me. 362; *Prescott v. Hawkins*, 16 N. H. 122; *Brown v. Lamphear*, 35 Vt. 260; *Cramer v. Burton*, 60 Barb. 225; *Andrews v. Gillespie*, 47 N. Y. 487; *Gray v. Hornbeck*, 31 Mo. 400.

² *White v. White*, L. R. 15 Eq. 247; *Andrews v. Spurr*, 8 Allen, 416; *Caldwell v. Fulton*, 31 Pa. St. 484; *Clement v. Youngman*, 40 Pa. St. 344; *Keene's Appeal*, 64 Pa. St. 274; *Mills v. Lockwood*, 42 Ill. 111.

³ *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 317; *Glass v. Hurlburt*, 102 Mass. 44; *Canedy v. Marcy*, 13 Gray, 373; *Hutchings v. Huggins*, 59 Ill. 32.

⁴ *Dunklee v. Wilton R. R.*, 24 N. H. 489; *Richardson v. Palmer*, 38 N. H. 218; *Connery v. Brooke*, 73 Pa. St. 84; *Adams v. Frothingham*, 3 Mass. 352;

prietor, and he subsequently sold it in parcels to different persons, so that the new channel was completely within the boundaries of one parcel, the grantee of this parcel could not, by restoring the stream to its old channel, inundate the other parcels.¹ So, also, if the grant was made of a farm, describing the same, but not particularizing what parcels were included under the general description, all parcels will pass by the deed which were at the time of the conveyance used and occupied together.² And where, at the time of the conveyance, the grantor had, in addition to some lands, a right of entry upon the breach of a condition, and the breach had not yet occurred, the land acquired by a subsequent exercise of the right of entry was held not to pass under a mortgage of all his rights and interests in lands in C.³

§ 829. *Falsa demonstratio non nocet*. — It is a general rule of construction that the deed should be so construed, that the whole deed shall stand and be enforced.⁴ If this is impossible, and the description contains several elements or descriptions, all of which are necessary to the identification of the property intended to be conveyed, the deed will be void if no property of the grantor can be found which will correspond with every part of the description.⁵ But if the intention, as gathered from the deed, does not make it necessary to satisfy all the elements of the description, or if parts of the description are inconsistent with other parts, and enough of them are con-

Commonwealth v. Roxberry, 9 Gray, 493; *Rider v. Thompson*, 23 Me. 244; *Abbott v. Abbott*, 51 Me. 581; *Lane v. Thompson*, 43 N. H. 324; *Pollard v. Maddox*, 28 Ala. 325; *Karmuller v. Kratz*, 18 Iowa, 356; *Stanley v. Greene*, 12 Cal. 148.

¹ 3 Washb. on Real Prop. 384; *Roberts v. Roberts*, 55 N. Y. 275.

² *Bell v. Woodward*, 46 N. H. 337.

³ *Richardson v. Cambridge*, 2 Allen, 118.

⁴ *Walters v. Breden*, 70 Pa. St. 238.

⁵ 3 Washb. on Real Prop. 400; *Brown v. Saltonstall*, 3 Me. 423; *Warren v. Coggsell*, 10 Gray, 76.

sistent to identify the property intended by the parties to pass, whatever is repugnant is rejected, and the deed is enforced under this construction.¹ Where two inconsistent parts of the description are equally balanced, it has been held that the grantee may choose that which is most favorable to him.² The first part of the description will prevail over the last, provided both appear in the granting portion of the deed; and if one part is *written* and the other is *printed*, the written part will prevail.³ If, therefore, a deed defines with reasonable certainty what is intended to be conveyed, the fact that a portion of the description is not satisfied by the specific property will not invalidate the conveyance.⁴ But if there are lands in the possession of the grantor which comply with all the particulars of the description, then only such lands will pass by the deed, although it might appear from evidence that other parcels are intended to pass also.⁵ In determining what is the *falsa demonstratio*, which may be rejected without invalidating the deed, it must be remembered that a particular or special description will always control a general or implied description, in whatever order they may come.⁶

¹ Corbin v. Healy, 20 Pick. 514; Bond v. Fay, 8 Allen, 212; Presbrey v. Presbrey, 13 Allen, 283; Doane v. Wilcutt, 16 Gray, 371; Abbott v. Abbott, 53 Me. 360; Scofield v. Lockwood, 35 Conn. 428; Law v. Hempstead, 10 Conn. 23; Peck v. Mallams, 10 N. Y. 532; Bass v. Mitchell, 22 Texas, 285.

² Esty v. Baker, 50 Me. 331; Melvin v. Proprietors, etc., 8 Metc. 27.

³ Webb v. Webb, 29 Ala. 606; McNear v. McComber, 18 Iowa, 17.

⁴ Parker v. Kane, 22 How. 1; Crosby v. Bradbury, 20 Me. 61; Parks v. Loomis, 6 Gray, 467; Presbrey v. Presbrey, 13 Allen, 283; Jackson v. Clark, 7 Johns. 223; Lush v. Druse, 4 Wend. 313; Morrow v. Willard, 30 Vt. 118; Spiller v. Scribner, 36 Vt. 246; Johnson v. Simpson, 36 N. H. 91; Bosworth v. Sturtevant, 2 Cush. 392; Hathaway v. Juneau, 15 Wis. 264; Fancher v. De Montegre, 1 Head, 40; Dodge v. Walley, 22 Cal. 224.

⁵ Brown v. Saltonstall, 3 Me. 423; Morrell v. Fisher, 4 Exch. 591; Warren v. Cogswell, 10 Gray, 76; Griffiths v. Penson, 1 H. & Colt. 862; Llewellyn v. Jersey, 11 Mees. & W. 183.

⁶ Smith v. Strong, 14 Pick. 128; Whiting v. Dewey, 15 Pick. 428; Winn v. Cabot, 18 Pick. 553; Dana v. Middlesex Bank, 10 Metc. 250; Howell v. Saule, 5 Mason, 410; Barney v. Miller, 18 Iowa, 466.

§ 830. **The elements of description.** — A full and complete description gives monuments, courses, and distances, and the quantity of land conveyed. The relative value of them, in determining the boundaries, is in the order given. Monuments control the courses and distances, and both control the quantity of land.¹ The reason for this order of preference lies in the rule of construction, that where there is an inconsistency in the description, that element of description will be followed as to which there is the least likelihood of a mistake.² And, generally, the description contains *data* for the location of all four sides of the tract of land. But where three are given, and there is sufficient description as to their courses and distances to establish the fourth by reasonable intendment, the deed will not be void.³

§ 831. **Monuments — Natural and artificial.** — There are two kinds of monuments, *natural*, or those objects which are permanent, and are found upon the land; and *artificial*, or those which are placed there for the very purpose of pointing out the boundary. Among the natural objects which may serve as monuments may be mentioned trees, streams, ponds, or lakes, shores and highways;⁴ and where reference is made in a deed to artificial monuments which

¹ *Brown v. Huger*, 21 How. 305; *Powell v. Clark*, 5 Mass. 355; *Llewellyn v. Jersey*, 11 Mees. & W. 183; *Hall v. Davis*, 36 N. H. 569; *Jackson v. Defendorf*, 1 Caines, 493; *Mann v. Pearson*, 2 Johns. 37; *Drew v. Swift*, 46 N. Y. 207; *Hall v. Mayhew*, 15 Md. 551; *Snow v. Chapman*, 1 Root, 528; *Murphy v. Campbell*, 4 Pa. St. 485; *Ufford v. Wilkins*, 33 Iowa, 113; *Mackentile v. Savoy*, 17 Serg. & R. 164; *Dalton v. Rust*, 22 Texas, 133; *Wright v. Wright*, 34 Ala. 194; *Commissioners v. Thompson*, 4 McCord, 434; *Miller v. Cherry*, 3 Jones Eq. 29; *Miller v. Bentley*, 5 Sneed, 671; *Stanley v. Green*, 12 Cal. 148; *Colton v. Seavey*, 22 Cal. 496; *Coburn v. Coxeter*, 51 N. H. 158.

² *Miller v. Cherry*, 3 Jones Eq. 29; *Melvin v. Proprietors, etc.*, 5 Metc. 28; *Esty v. Baker*, 50 Me. 311; *Ferris v. Coover*, 10 Cal. 628.

³ *Commonwealth v. Roxbury*, 9 Gray, 490.

⁴ *Flagg v. Thurston*, 13 Pick. 150; *Bloch v. Pfaff*, 101 Mass. 538; *Bates v. Tymanson*, 13 Wend. 300; *Carroll v. Norwood*, 5 Har. & J. 163; *Smith v. Murphy*, 1 Tayl. 303.

do not then exist, they may be located subsequently by the parties. They will then control the courses and distances, although it may be possible to show by parol evidence that the artificial monuments as erected do not show the true line.¹ Parol evidence is not admissible to control the boundaries in a deed.² But if the monuments are lost, or have been moved, or there is doubt as to which of two objects was intended to be the monument, parol evidence is admissible to determine the monument or its location.³ And the question, where the boundaries are and what is the location of the monuments, is one of fact for the jury.⁴ Natural monuments are higher in value than artificial ones, and are always given the preference in the case of an inconsistency in the description arising from a reference to both.⁵ Where a line is described as running from one monument to another, it is always a straight line between those two points. And if three monuments are referred to as points on the boundary, the line must be straight from one monu-

¹ *Kennebec Purchase v. Tiffany*, 1 Me. 219; *Knowles v. Toothacker*, 58 Me. 175; *Corning v. Troy Co.*, 40 N. Y. 208; *Makepeace v. Bancroft*, 12 Mass. 469; *Waterman v. Johnson*, 13 Pick. 261; *Cleveland v. Flagg*, 4 Cush. 81; *Blaney v. Rice*, 20 Pick. 62; *Hathaway v. Evans*, 108 Mass. 270; *Lerned v. Morrill*, 2 N. H. 197; *Rockwell v. Baldwin*, 53 Ill. 22; *Purinton v. N. Ill. R. R.*, 46 Ill. 300; *Smith v. Hamilton*, 20 Mich. 433.

² *Parker v. Kane*, 22 How. 1; *Dean v. Erskine*, 18 N. H. 83; *Child v. Wells*, 13 Pick. 121; *Frost v. Spaulding*, 19 Pick. 445; *Dodge v. Nichols*, 5 Allen, 548; *Pride v. Lunt*, 19 Me. 115; *Spiller v. Scribner*, 36 Vt. 247; *Clark v. Baird*, 9 N. Y. 183; *Terry v. Chandler*, 16 N. Y. 358; *Drew v. Swift*, 46 N. Y. 209; *McCoy v. Galloway*, 3 Ohio, 283.

³ *Stone v. Clark*, 1 Metc. 378; *Waterman v. Johnson*, 13 Pick. 267; *Frost v. Spaulding*, 19 Pick. 445; *Claremont v. Carlton*, 2 N. H. 369; *Gratz v. Beates*, 45 Pa. St. 504; *Middleton v. Perry*, 2 Bay, 539; *Ferris v. Coover*, 10 Cal. 624; *Colton v. Seavey*, 22 Cal. 496.

⁴ *Abbott v. Abbott*, 51 Me. 581; *Opdyke v. Stephens*, 28 N. J. L. 90.

⁵ *Bolton v. Lann*, 16 Texas, 96; *Ogden v. Porterfield*, 34 Pa. St. 196; *Falwood v. Graham*, 1 Rich. 497; *Beahan v. Stapleton*, 13 Gray, 427; *Ferris v. Coover*, 10 Cal. 624; *Brown v. Huger*, 21 How. 305; *McIver v. Walker*, 4 Wheat. 444; *Newsom v. Pryor*, 7 Wheat. 7; *Shelton v. Maupin*, 16 Mo. 124; *Duren v. Presberry*, 25 Texas, 512.

ment to another successively.¹ Furthermore, if a line is described as running from a given point to a natural object, like a highway or stream, unless the course or length of the line is given, it must be the shortest line drawn from the point to the object, and must, therefore, be at right angles with the stream or highway.² Where the line is described as running "between" two objects, the objects, as well as the land lying between them, are included in the grant. So, also, when the description is "from" one object "to" another.³

§ 832. **Artificial monuments in the United States' surveys.** — The public lands of the Western Territories, which became the property of the United States government upon the formation of the present Union, were by acts of Congress surveyed and divided up into townships, sections, and subdivisions of sections, as has been already explained.⁴ When afterwards these lands were sold to private individuals, they were always described by referring to the number of the township, section, and subdivision of the section. The boundaries of these sections and of the quarter and half sections were marked for the most part by artificial monuments, which constituted the corners of these tracts of land. If, therefore, the deed calls for a certain quarter section of a certain section in a certain township, a reference to the maps and field notes of the survey will determine the loca-

¹ *Allen v. Kingsbury*, 16 Pick. 235; *Jenks v. Morgan*, 6 Gray, 448; *Hovey v. Sawyer*, 5 Allen, 585; *Nelson v. Hall*, 1 McLean, 519; *Caraway v. Chancy*, 6 Jones L. 364; *Baker v. Talbott*, 6 B. Mon. 179; *McCoy v. Galloway*, 3 Ohio, 382.

² *Van Gorden v. Jackson*, 5 Johns. 474; *Bradley v. Wilson*, 58 Me. 360; *Craig v. Hawkins*, 1 Bibb, 64; *Hicks v. Coleman*, 25 Cal. 142; *Caraway v. Chancy*, 6 Jones L. 364.

³ *Bonney v. Morrill*, 52 Me. 256; *Revere v. Leonard*, 1 Mass. 91; *Hatch v. Dwight*, 17 Mass. 289; *Carbrey v. Willis*, 7 Allen 370; *Millett v. Fowle*, 8 Cush. 150; *Wells v. Jackson Iron Co.*, 48 N. H. 491.

⁴ See *ante*, sect. 744.

tion of the land, for maps and surveys are generally proper evidence for the establishment of boundaries,¹ and the United States Statutes make the field notes and plats of the original surveyor the primary and controlling evidence of boundary.² These field notes and the plats call for artificial monuments to designate the corners of the tract, and when they are found, since artificial monuments control distances and courses in government surveys as well as in ordinary cases,³ no difficulty will be experienced in ascertaining the boundaries, except in two cases: *First*, if the deed calls for natural monuments, and the land is described in part by a reference to them; and *secondly*, where the description consists in a reference to the township and section, and it is ascertained that one or more of the corners have been lost. In the first case, the general rule that natural monuments control in the matter of boundary both the artificial monuments and the courses and distances, applies here in its full force, although the plats and field notes would indicate a different location.⁴ The second case presents a greater difficulty. It is a general rule of construction that where the natural and artificial monuments cannot be ascertained by any proper evidence, the courses and distances must govern the location of the

¹ *Haring v. Van Houten*, 22 N. J. L. 61; *Alexander v. Lively*, 5 B. Mon. 159; *Bruce v. Taylor*, 2 J. J. Marsh. 160; *Steele v. Taylor*, 3 A. K. Marsh. 226; *Madison City v. Hildreth*, 2 Ind. 274; *Tate v. Gray*, 1 Swan, 73; *Carmichael v. Trustees*, 4 Miss. 84; *McClintock v. Rogers*, 11 Ill. 279.

² U. S. Rev. Stat., sect. 2396. "The boundary lines actually run and marked in the surveys returned by the Surveyor-General shall be established as the proper boundary lines of the sections or subdivisions for which they were intended." *Bruce v. Taylor*, 2 J. J. Marsh. 160; *Steele v. Taylor*, 3 A. K. Marsh. 226; *McClintock v. Rogers*, 11 Ill. 279.

³ *Robinson v. Moore*, 4 McLean, 279; *Esmond v. Tarbox*, 7 Me. 61; *Hall v. Davis*, 36 N. H. 569; *Hunt v. McHenry*, Wright, 599; *Bayless v. Rupert*, Wright, 634; *Bruckner v. Lawrence*, 1 Dougl. (Mich.) 19; *Climer v. Wallace*, 28 Mo. 556.

⁴ *Brown v. Hager*, 21 How. 305; *McIver v. Walker*, 4 Wheat. 444; *Newsom v. Pryor*, 7 Wheat. 7; *Shelton v. Maupin*, 16 Mo. 124; *Duren v. Presberry*, 25 Texas, 512.

boundary, and this is also the rule in respect to the lost corners in the government surveys.¹ But before the courses and distances can determine the boundary, *all means for ascertaining the location of the lost monuments must first be exhausted*. Parol evidence is admissible to establish the location of monuments, and even *hearsay* evidence and evidence of general reputation are admissible in such cases.² But in the case of government or public lands, as a general rule, the courts and the parties rely chiefly upon the surveys and plats returned by the Surveyor-General for the evidence of boundary, and, where the corners are lost and cannot be established by parol evidence, the surveys and plats only give the courses and distances. If the surveys were accurate, and the courses and distances given in the field notes corresponded exactly with the actual location of the corners, a resort to these courses and distances would do complete justice to all the parties interested in the ascertainment of the boundary. But, as a matter of fact, the chains used in making the measurements were stretched by constant use, so that they were in most cases much longer than the standard chain, thus making the courses and distances call for less land than was actually included within the established corners. The Supreme Court of Missouri, relying upon the rule that courses and distances control the boundary when the monuments are lost, has held that where a corner is lost the surveyor must measure from the known corner on the eastern line of the township or section the distance called for by the plat and field notes, and the corner must be established at that distance, the surplus of land being given

* Heaton v. Hodges, 14 Me. 66; Budd v. Brooke, 3 Gill, 198; Bruckner v. Lawrence, 1 Dougl. (Mich.) 19; Calvert v. Fitzgerald, 6 Litt. 391.

² Boardman v. Reed, 6 Pet. 341; Jackson v. McCall, 10 Johns. 377; Lay v. Neville, 25 Cal. 545; Smith v. Shackelford, 9 Dana, 452; McCoy v. Galloway, 3 Ohio, 283; Nixon v. Porter, 34 Miss. 697; Smith v. Prewitt, 2 A. K. Marsh. 158; Morton v. Folger, 15 Cal. 275; Stroud v. Springfield, 28 Texas, 649; Yates v. Shaw, 24 Ill. 367.

to the western section or quarter section.¹ This is contrary to the provisions of the United States Statutes, which must govern in all disputes as to the boundaries of government lands. It is provided by statute that “all the corners *marked in the surveys*, returned by the Surveyor-General, shall be established as the proper corners of sections or subdivisions of sections, which they were intended to designate; and the corners of half and quarter sections not marked on the surveys shall be placed as nearly as possible equidistant from two corners which stand on the same line.” This statutory provision clearly makes the field notes the proper and the best means of ascertaining lost corners, and the interpretation of the field notes must be governed largely, if not exclusively, by the principles of civil engineering. The object being to ascertain the exact location of a lost corner, it is necessary, and the United States Statutes require it, that the errors in the measurements should be noted. If, therefore, the courses and distances fall below the actual amount of land included in the two contiguous sections or subdivisions of sections, between which the boundary is to be ascertained, the surplus of land should be divided between the two tracts of land in proportion to the respective lengths of their lines in the plats.²

§ 833. *Non-navigable streams.* — Generally, where land is bounded by a stream which is not navigable, the boundary line is the centre line of the stream, the *filum aquæ*; and the line changes its course with the natural and gradual

¹ Knight v. Elliott, 57 Mo. 322; Vaughn v. Tate, 64 Mo. 491; Major v. Watson, 73 Mo. 665. And this seems also to be the position of the court of Virginia upon a parallel case. Overton v. Devisson, 1 Gratt. 211.

² This rule is recognized and adopted in Jones v. Kimble, 19 Wis. 429, and constitutes one of the printed instructions to the United States deputy and county surveyors; and these instructions are by statute made a part of every contract for surveying land. Sect. 2399, U. S. Rev. Stat.

change in the current.¹ But it does not always follow that the thread of the stream will be the boundary line, because the stream is referred to in the deed. If the stream is mentioned as the boundary in general terms, or the land is described as "bounding on" or "running along" a river, the stream will be held to be the monument and the thread of the stream is the boundary line. And this is true, although the deed describes the line on the stream as extending from one object to another, both of which are on the shore; as, for example, "bounding on" the stream and "extending from" one tree on the bank to another. The *termini* of the boundary line are ascertained by drawing lines at right angles with the shore from these objects to the centre of the stream.² But if the land is described as bounding *on the bank or shore* of the stream, then the low-water mark on the banks will be the boundary. The particular reference to the bank excludes the stream.³ Where the stream or its bank is the boundary line, it follows its meanderings so that if the distance is given it is ascertained by reducing the irregular lines of the shore to a straight line.⁴

¹ *Morrison v. Keen*, 3 Me. 474; *Hatch v. Dwight*, 17 Mass. 289; *People v. Canal Appraisers*, 13 Wend. 355; *Commissioners v. Kempshall*, 26 Wend. 404; *People v. Platt*, 17 Johns. 195; *Morgan v. Reading*, 3 Smed. & M. 366; *Browne v. Kennedy*, 5 Har. & J. 195; *Hayes v. Bowman*, 1 Rand. 417; *Lynch v. Allen*, 4 Dev. & B. 62; *State v. Gilmanton*, 9 N. H. 461; *Arnold v. Elmore*, 16 Wis. 514; *Love v. White*, 20 Wis. 432.

² *Lunt v. Holland*, 14 Mass. 150; *Commonwealth v. Alger*, 7 Cush. 97; *Cold Springs Iron Works v. Tolland*, 9 Cush. 492; *Newhall v. Ireson*, 13 Gray, 262; *Railroad v. Schurmeier*, 7 Wall, 286; *Luce v. Carley*, 24 Wend. 451; *Varick v. Smith*, 9 Paige Ch. 547; *Brown v. Chadbourne*, 31 Me. 9; *Robinson v. White*, 42 Me. 218; *Newton v. Eddy*, 23 Vt. 319; *Cox v. Freedley*, 33 Pa. St. 129; *McCulloch v. Aten*, 2 Ohio, 425.

³ *Bradford v. Cressey*, 45 Me. 9; *Child v. Starr*, 4 Hill 369; *Halsey v. McCormick*, 13 N. Y. 296; *Babcock v. Utter*, 1 Abb. Pr. 27; *Dunlap v. Stetson*, 4 Mason, 349; *Daniels v. Cheshire R. R.*, 20 N. H. 85; *Martin v. Nance*, 3 Head, 650; *Watson v. Peters*, 26 Mich. 516.

⁴ *Calk v. Stribling*, 1 Bibb, 122; *Hicks v. Coleman*, 25 Cal. 142; *People v. Henderson*, 40 Cal. 32.

§ 834. **Navigable streams.** — Where land is bounded by a navigable stream, strictly so-called, *i.e.*, where the tide ebbs and flows, the boundary line is the high-water mark on the shore.¹ But in the States where the large rivers of this country are held to be navigable, although having no tide-water, the boundary line is held on those rivers to be at low-water mark.² But in both cases the riparian owner has, as appurtenant to his ownership, the right to erect and maintain wharfs or piers, subject to the governmental control necessary for the protection of the public.³ The same rule applies to land bounded by the sea or by the arms of the sea. The boundary line is the high-water mark, and what is called the shore or beach is the property of the State.⁴ In Massachusetts, by statute, the common law has been changed, and now riparian owners on navigable rivers and arms of the sea own up to the low-water mark.⁵ In determining the exact location of either the low or high-water mark, reference is always had to the ordinary or medium rise and fall of the water.⁶

¹ *Canal Comm'rs v. The People*, 5 Wend. 423; *Wheeler v. Spinola*, 54 N. Y. 377; *East Haven v. Hemingway*, 7 Conn. 186; *Niles v. Patch*, 13 Gray, 254; *Stewart v. Fitch*, 30 N. J. L. 20; *Middleton v. Pritchard*, 4 Ill. 520.

² *Stover v. Jack*, 60 Pa. St. 339; *Wood v. Appal*, 63 Pa. St. 221; *Wainwright v. McCullough*, 63 Pa. St. 66; *Ryan v. Brown*, 18 Mich. 196; *Martin v. Evansville*, 32 Ind. 85; *Ensminger v. People*, 47 Ill. 384; *People v. Canal Comm'rs*, 33 N. Y. 461; *Edder v. Burrus*, 6 Humph. 367; *Martin v. Nance*, 3 Head, 650.

³ *Ensminger v. Davis*, 47 Ill. 384; *Ryan v. Brown*, 18 Mich. 196; *Yates v. Milwaukee*, 10 Wall. 497; *Weber v. Harbor Comm'rs*, 18 Wall. 64. For a discussion of what is a navigable stream, and for the distinction between public, navigable and non-navigable stream, see *post*, sect. 835.

⁴ *Storer v. Freeman*, 6 Mass. 435; *Commonwealth v. Roxbury*, 9 Gray, 492; *Niles v. Patch*, 13 Gray, 254; *Pollard v. Hogan*, 3 How. 230; *Goodtitle v. Kibbe*, 9 How. 477; *Hodge v. Boothby*, 48 Me. 71; *Cortelyou v. Van Brundt*, 2 Johns. 362; *Ledyard v. Ten Eyck*, 36 Barb. 125; *Mather v. Chapman*, 40 Conn. 382; *Dana v. Jackson St. Wharf*, 31 Cal. 120.

⁵ *Boston v. Richardson*, 105 Mass. 353; *Paine v. Woods*, 108 Mass. 168; *Valentine v. Piper*, 22 Pick. 94.

⁶ *Stover v. Jack*, 60 Pa. St. 339; *Tinnicum Fishing Co. v. Carter*, 61 Pa. St. 21; *Wood v. Appal*, 63 Pa. St. 221; *Commonwealth v. Alger*, 7 Cush. 63;

§ 835. **What is a navigable stream.** — Perhaps there is not a more difficult question to answer in the law of real property. The English common-law rule was that all streams, in which the tide ebbed and flowed, were navigable streams, and all others were non-navigable.¹ In England this is not, as a matter of fact, the arbitrary rule, which it would be, if applied without qualification to the streams of this country. With the exception of the Thames, above tide-water, there are no important streams in England which are practically and actually navigable, except those in which the tide ebbs and flows; and there are no tide-water streams of any importance which are not actually navigable. But in the United States the situation is altogether different. Here we have fresh-water streams, which are navigable, and salt-water streams of great value, which are not navigable. The application of the common-law rule to this country would, therefore, result in nothing but absurd conclusions. The courts of this country have been discussing the problem for many years, and have come to different conclusions on the various branches or subdivisions of the question. On only one point is there an absolute agreement, viz.: that the common-law rule does not govern such questions in the United States, so far as the right of the public to navigate the streams is concerned. That is, the courts hold uniformly that where the streams are sufficiently deep and wide to float boats, used in the interests of commerce and agriculture, the public has a right to use them as highways.² But in whom is the title of the

Commonwealth v. Roxbury, 9 Gray, 451; *Martin v. O'Brien*, 32 Miss. 21; *City of Galveston v. Menard*, 23 Texas, 349; *Teschemacher v. Thompson*, 18 Cal. 21.

¹ 3 Washb. on Real Prop. 413; *People v. Tibbetts*, 19 N. Y. 523; *Commonwealth v. Chapin*, 5 Pick. 199.

² *The Daniel Ball*, 10 Wall. 557; *The Montello*, 20 Wall. 439; *Spring v. Russell*, 7 Me. 273; *Brown v. Chadbourne*, 31 Me. 9; *Ingraham v. Wilkinson*, 4 Pick. 268; *Commonwealth v. Alger*, 7 Cush. 53; *The Canal Comm'rs v. People*, 5 Wend. 423; *People v. Platt*, 17 Johns. 195; *Palmer v. Mulligan*, 3 Caines, 315; *Claremont v. Carlton*, 2 N. H. 369; *O'Fallon v. Daggett*, 4 Mo.

soil of the river's bed, or in what rivers does the State own the title to the bed, is differently decided in different courts. The courts are unanimous in holding that ordinarily, where the tide ebbs and flows, the title to the bed of the stream is in the State.¹ But the State does not own the soil or bed of every creek in which the tide ebbs and flows. In order that the title to the soil of such creeks may be claimed by the State, the creeks must be practically navigable.² But in respect to the title to the beds of fresh water navigable streams the courts are divided. A number of the courts have held that the fresh water streams are governed by the common-law rule, in respect to the title to the soil under navigable streams, and that the title to the beds of fresh water streams is in the State.³ But the Supreme Court of Mississippi, in a very able and learned opinion, drew a distinction between *public* and *navigable* rivers. It was there asserted that the principle, that the title to the soil of navigable rivers, *i.e.*, rivers in which the tide ebbs and flows, was in the State, was derived from international law. Tidal waters are the highways of nations, and very properly the title to the beds of such streams was vested in the State.

343; *Middleton v. Pritchard*, 4 Ill. 560; *Morgan v. Reading*, 3 Smed. & M. 366; *Cates v. Wadlington*, 1 McCord, 580; *Gavit v. Chambers*, 3 Ohio, 495; *Blanchard v. Porter*, 11 Ohio, 138; *Home v. Richards*, 4 Call, 441; *Shrunk v. Schuylkill Co.*, 14 Serg. & R. 71; *McManus v. Carmichael*, 3 Iowa, 1; *Comm'rs, etc., v. Withers*, 29 Miss. 29.

¹ *Commonwealth v. Chapin*, 5 Pick. 199; *People v. Tibbetts*, 19 N. Y. 523; *Smith v. Levinus*, 8 N. Y. 472; *Keyport Steamboat Co. v. Farmers' Transp. Co.*, 18 N. J. Eq. 13; *Cobb v. Davenport*, 32 N. J. L. 369; *Flanagan v. Philadelphia*, 42 Pa. St. 219.

² *Rowe v. Granite Bridge Corp.*, 21 Pick. 344; *Glover v. Powell*, 10 N. J. Eq. 211. See *State v. Gilmanton* 14 N. H. 467; *Wilson v. Forbes*, 2 Dev. L. 30; *Am. River, etc., Co. v. Amsden*, 6 Cal. 443.

³ *Barney v. Keokuk*, 94 U. S. 324; *Carson v. Blazer*, 2 Binn. 475; *Shrunk v. Schuylkill Co.*, 14 Serg. & R. 71; *McManus v. Carmichael*, 3 Iowa, 1; *Stover v. Jack*, 60 Pa. St. 339; *Wainwright v. McCullough*, 63 Pa. St. 66; *Martin v. Evansville*, 23 Ind. 85; *People v. Canal Comm'rs*, 33 N. Y. 461; *Bullock v. Wilson*, 2 Port. 436; *Martin v. Nance*, 3 Head, 650; *Wilson v. Forbes*, 2 Dev. L. 30.

But where the navigable river is a fresh water stream, although a sound policy would require a grant to the public of a right of way over it, there is no reason why a distinction should be made between them and non-navigable streams, in respect to the location of the title to the soil. It was, therefore, held that the public have a right of way over fresh water streams which can be navigated, but that the title to the bed is in the riparian owners, and the boundary line is the centre line of the stream.¹ It is so essential that there should be uniformity in the adjudications on this subject that the author is induced to offer the following suggestions, which will probably point out a common meeting-ground for variant courts, and which seem also to be consistent with reason and the necessities of life. Only those streams will be navigable streams which can be actually navigated, whether the tide ebbs or flows in them or not. The Supreme Court of the United States has held that those rivers, which from their location constitute the boundaries of States, and which are used, or may be adapted for use, in interstate and foreign commerce, are navigable streams of the United States.² Let that be a controlling principle, and declare the title to the bed of such streams to be in the riparian States, in conformity with the decisions of the United States Supreme Court. Those streams might very properly be classed among the highways of nations, for the States in this connection are to be considered as separate and independent bodies politic. But the *intra*-territorial

¹ *Steamboat Magnolia v. Marshall*, 39 Miss. 109. The rule that the title to the beds of those rivers is in the riparian owners is supported by the following authorities: *Canal Appraisers v. People*, 17 Wend. 595; *Ingraham v. Wilkins*, 4 Pick. 268; *Commonwealth v. Alger*, 7 Cush. 53; *People v. Platt*, 17 Johns. 195; *Palmer v. Mulligan*, 3 Caines, 315; *Claremont v. Carlton*, 2 N. H. 369; *O'Fallon v. Daggett*, 4 Mo. 343; *Morgan v. Reading*, 3 Smed. & M. 366; *Blanchard v. Porter*, 11 Ohio, 138; *Rhodes v. Otis*, 33 Ala. 578; *Berry v. Snyder*, 3 Bush, 266; *Walker v. Public Works*, 16 Ohio, 540; *Ryan v. Brown*, 18 Mich. 196; *Ensminger v. People*, 47 Ill. 384.

² *The Daniel Ball*, 10 Wall. 557; *The Montello*, 11 Wall. 411.

streams cannot be called international highways, and, therefore, the title to the soil of such streams should be vested in the riparian owners, subject to the public easement of navigation.

§ 836. **Ponds and lakes.** — If the pond or lake is a natural object, the boundary line is along the edge at low-water mark.¹ If the pond is artificial, the boundary is through its centre.² And if a natural pond or lake is raised by artificial means by a dam or trench, the boundary line will continue to be at low-water mark of the pond in its natural state, and the land which was subsequently left bare by the removal of the obstructions would be the property of the adjoining riparian owner.³ The conversion of a fresh water pond into a salt one by an artificial trench or channel from the sea will not change the boundary. But the boundary changes with the natural and ordinary changes of the low-water mark.⁴

§ 837. **Highways.** — Where land is bounded by a highway, the same rules of construction apply, as in the case of non-navigable streams. If the land is described as “ bounding on,” “ running along,” the highway, and the like, the boundary line is the thread or centre of the way, although

¹ *Waterman v. Johnson*, 13 Pick. 261; *West Roxbury v. Stoddard*, 7 Allen, 167; *Nelson v. Butterfield*, 21 Me. 229; *Manton v. Blake*, 62 Me. 38; *Canal Comm'rs v. People*, 5 Wend. 446; *Wheeler v. Spinola*, 54 N. Y. 377; *Jakeway v. Barrett*, 38 Vt. 323; *Austin v. Rutland R. R.*, 45 Vt. 215; *Primm v. Walker*, 38 Mo. 99.

² *Bradley v. Rice*, 13 Me. 198; *Lowell v. Robinson*, 16 Me. 357; *Waterman v. Johnson*, 13 Pick. 261; *Phinney v. Watts*, 9 Gray, 269; *Wheeler v. Spinola*, 54 N. Y. 377.

³ *Hathorn v. Stinson*, 12 Me. 183; *Bradley v. Rice*, 13 Me. 200; *Waterman v. Johnson*, 13 Pick. 261. But later decisions in these States have qualified the position assumed in the cases just cited to this extent: that unless there is something in the deed to support the presumption that the grantor had in mind the natural state of the pond, when he was describing the land, the boundary line will be the low-water mark of the pond at the time of the conveyance. *Wood v. Kelley*, 30 Me. 47; *Paine v. Woods*, 108 Mass. 170.

⁴ 3 Washb. on Real Prop. 417; *Wheeler v. Spinola*, 54 N. Y. 377.

the dimensions of the last would exclude the highway. And when there is any doubt as to the intention of the parties, the presumption is always strong in favor of the centre of the way being the boundary.¹ But if the land is described as bounding by the side of the street, or the intention to exclude the street is clearly manifested in some other manner, then the boundary line will be the nearest line of the street or highway.² The boundary will not extend to the centre of the highway, if the grantor only owns to the line of the way.³ And likewise, if a proprietor lays out several lots, all fronting on a proposed park, the grantees of the several lots will only own to the exterior line of the park, and not to the centre.⁴ If the land is described as bounding on a public street or highway, the right to have it kept open passes to the grantee as an appurtenant easement.⁵ But if it is a private way, a right of way will be acquired by the grantee only upon the adjoining lands of the grantor.⁶ If

¹ *Berridge v. Ward*, 10 C. B. (N. s.) 400; *Johnson v. Anderson*, 18 Me. 76; *Cottle v. Young*, 59 Me. 105; *O'Linda v. Lothrop*, 21 Pick. 298; *Parker v. Framingham*, 8 Metc. 267; *Fisher v. Smith*, 9 Gray, 441; *Harris v. Elliott*, 10 Pet. 53; *Banks v. Ogden*, 2 Wall. 57; *Morrow v. Willard*, 30 Vt. 118; *White v. Godfrey*, 97 Mass. 47; *Wallace v. Fee*, 50 N. Y. 694; *Milhan v. Sharp*, 27 N. Y. 624; *Jackson v. Hathaway*, 15 Johns. 454; *Sherman v. McKeon*, 38 N. Y. 271; *Child v. Starr*, 4 Hill, 369; *Read v. Leeds*, 19 Conn. 187; *Winter v. Peterson*, 24 N. J. L. 527; *Paul v. Carver*, 24 Pa. St. 207; *Cox v. Freedley*, 33 Pa. St. 124; *Witter v. Harvey*, 1 McCord, 67; *Trustees v. Louder*, 8 Bush, 680; *Canal Trustees v. Havens*, 11 Ill. 557; *Kimball v. Kenosha*, 4 Wis. 331; *Weisbrod v. C. & N. W. R. R.*, 18 Wis. 43; *Dubuque v. Maloney*, 9 Iowa, 458.

² *Salisbury v. G. N. Railway Co.*, 5 C. B. (N. s.) 174; *Sibley v. Holden*, 10 Pick. 249; *Smith v. Slocomb*, 9 Gray, 36; *Brainard v. Boston, etc., R. R.*, 12 Gray, 410; *Morrow v. Willard*, 30 Vt. 118; *Hoboken Land Co. v. Kerrigan*, 30 N. J. L. 16.

³ *Brainard v. Boston, etc., R. R.*, 12 Gray, 410; *Church v. Meeker*, 34 Conn. 426; *Dunham v. Williams*, 37 N. Y. 251.

⁴ *Perrin v. N. Y. Cent. R. R.*, 40 Barb. 65; *Hanson v. Campbell*, 20 Md. 223.

⁵ *Cox v. James*, 59 Barb. 144; 3 Washb. on Real Prop. 422, 423.

⁶ *Smith v. Howdon*, 14 C. B. (N. s.) 398; *Fisher v. Smith*, 9 Gray, 444; *Winslow v. King*, 14 Gray, 323; *White v. Godfrey*, 97 Mass. 472; *Stark v. Coffin*, 105 Mass. 330; *Lewis v. Beattie*, 105 Mass. 410; *Falls v. Reis*, 74 Pa. St. 439.

the grantor does not own the land, no covenant will be implied from the reference to a street for the purpose of description.¹ Where a highway or street is referred to as the boundary line, the actual line, as it is laid down, is to be taken as the line of the street. And although encroachments upon the highway by the adjoining owners are not legalized by the lapse of time, yet if a fence has been standing for twenty years upon the highway as it was originally laid out, the fence will be considered the true line if the real boundary cannot be ascertained by record.² And if the road or street is subsequently abandoned, the adjoining owners will then hold the land over which the highway extended, free from the public easement.³

§ 838. **Walls, fences, trees, etc.** — When walls, fences, trees, and the like, are referred to as monuments, if they are of considerable thickness or width, the boundary line is always in the centre of the monument, as has been seen to be the case with streams and highways.⁴

§ 839. **Courses and distances.** — The next element of description in the order of preference is the admeasurement of distances and the given courses of the boundary lines. Where courses and distances are given in a deed, conveying a city lot of comparatively small dimensions, they are greatly relied upon in determining the boundaries. And where there are no monuments, parol evidence will not be

¹ *Roberts v. Karr*, 1 Taunt. 495; *Howe v. Alger*, 4 Allen, 200; *Brainard v. Boston*, etc., R. R., 12 Gray, 410; *White v. Flannigan*, 1 Md. 540; *Hanson v. Campbell*, 20 Md. 232.

² *Hallenbeck v. Rowley*, 8 Allen, 475; *Fisher v. Smith*, 9 Gray, 441; *Lozier v. N. Y. Cent. R. R.*, 42 Barb. 468; *Bissell v. N. Y. Cent. R. R.*, 23 N. Y. 61; *Cross v. Morristown*, 18 N. J. Eq. 305.

³ *Banks v. Ogden*, 2 Wall. 57; *People v. Law*, 22 How. Pr. 115; *Wallace v. Fee*, 50 N. Y. 694; *Weisbrod & C. N. W. R. R.*, 18 Wis. 43.

⁴ *Bradford v. Cressey*, 45 Me. 9; *Boston v. Richardson*, 13 Allen, 154; *Warner v. Southworth*, 6 Conn. 471; *Child v. Starr*, 4 Hill. 369.

permitted to vary them. Nothing but monuments can control courses and distances.¹ The courses and distances will be the absolutely determining element in the absence of monuments, although the admeasurements are given as so many feet, "more or less."² But a survey is so liable to be erroneous through some defect in the instrument, or the carelessness of the surveyor, that whenever monuments are given the monuments control the courses and distances, although the monuments would take in more land than what is called for by the survey.³ And where the land is described by another's land, the latter tract of land is a monument of description, and the true line of his land will control the courses and distances given in the deed.⁴ When the course is described as "northerly," "southerly," etc., the line is always understood as "due" north, or south. But reference is always made to the magnetic meridian in determining the direction of the boundary lines.⁵

§ 840. **Quantity.**—The quantity of land conveyed is sometimes given; but where there is no covenant as to quantity this element of description is seldom resorted to in determining the boundaries, and is under no circumstances

¹ *Drew v. Swift*, 46 N. Y. 209; *Chadbourn v. Mason*, 48 Me. 391; *Bagley v. Morrill*, 46 Vt. 94.

² *Flagg v. Thurston*, 13 Pick. 145; *Blaney v. Rice*, 20 Pick. 62; *Block v. Pfaff*, 101 Mass. 538; *Cherry v. Slade*, 3 Murph. 82; *Welch v. Phillips*, 1 McCord, 215.

³ *White v. Williams*, 48 N. Y. 344; *Drew v. Swift*, 46 N. Y. 207; *Schmitz v. Schmitz*, 19 Wis. 210; *Cronin v. Richardson*, 8 Allen, 423; *Brown v. Huger*, 21 How. 305; *Haynes v. Jackson*, 59 Me. 386; *Murphy v. Campbell*, 4 Pa. St. 485; *Lodge v. Barnett*, 46 Pa. St. 484; *Colton v. Seavey*, 22 Cal. 496; *Miller v. Cherry*, 3 Jones, 29; *Davis v. Rainsford*, 17 Mass. 207; *Frost v. Spaulding*, 19 Pick. 445; *Evansville v. Page*, 23 Ind. 527.

⁴ *Peaslee v. Gee*, 19 N. Y. 273; *Bailey v. White*, 41 N. H. 343; *Park v. Pratt*, 38 Vt. 552.

⁵ *Brandt v. Ogden*, 1 Johns. Cas. 158; *Gordon v. Jackson*, 5 Johns. 473; *Jackson v. Reeves*, 3 Caines, 293; *Wells v. Company*, 47 N. H. 235; *Bosworth v. Danzien*, 25 Cal. 296.

permitted to control the courses and distance or the monuments.¹

§ 841. **Reference to other deeds, maps, etc., for description.** — If, instead of containing the description of the land conveyed, the deed refers to other deeds, the description of the latter deed will by such reference become a part of the former, and has the same effect as if it had been inserted in the subsequent deed.² It is not necessary that the deed referred to be recorded, although if the deed referred to is described as being recorded, no unrecorded deed will answer to supply the description of the premises.³ But the reference to another deed will not be permitted to control the description actually contained in the subsequent deed, so as to exclude a lot or parcel of land described as part of the subject of conveyance, and not mentioned in the deed referred to.⁴ In the same manner, where a reference in the deed is made to plans, maps, and the like, for the monuments, courses and distance, the maps and plans become a part of the deed of conveyance, and supply the description omitted in the deed.⁵ But if the boundaries can be ascertained without reference to the maps or plans, they need

¹ *Mann v. Pearson*, 2 Johns. 37; *Jackson v. Defendorff*, 1 Caines, 493; *Powell v. Clark*, 5 Mass. 355; *Snow v. Chapman*, 1 Root, 528; *Comm'rs v. Thompson*, 4 McCord, 434; *Hall v. Mahew*, 15 Md. 551; *Miller v. Bentley*, 5 Sneed, 671; *Wright v. Wright*, 34 Ala. 194; *Dutton v. Rust*, 22 Texas, 133; *Ufford v. Wilkins*, 33 Iowa, 113; *Ward v. Crotty*, 4 Metc. (Ky.) 103; *Stanley v. Green*, 12 Cal. 148; *Llewellyn v. Jersey*, 11 Mees. & W. 183.

² *Knight v. Dyer*, 57 Me. 176; *Allen v. Bates*, 6 Pick. 460; *Foss v. Crisp*, 20 Pick. 121; *Allen v. Taft*, 6 Gray, 552; *Perry v. Binney*, 103 Mass. 158; *Lippitt v. Kelly*, 46 Vt. 523; *Jenks v. Ward*, 4 Mich. 404; *Vance v. Fore*, 24 Cal. 444.

³ *Simmons v. Johnson*, 14 Wis. 526; *Caldwell v. Center*, 30 Cal. 543.

⁴ *Whitney v. Dewey*, 15 Pick. 434; *Needham v. Judson*, 101 Mass. 161.

⁵ *Kennebec Purchase v. Tiffany*, 1 Me. 219; *Thomas v. Patten*, 13 Me. 329; *Shirras v. Caig*, 7 Cranch, 48; *Davis v. Rainsford*, 17 Mass. 207; *Farnsworth v. Taylor*, 9 Gray, 162; *Stetson v. Daw*, 16 Gray, 374; *Chamberlain v. Bradley*, 101 Mass. 191; *Fox v. Union Sugar Co.*, 109 Mass. 292; *Birmingham v. Anderson*, 48 Pa. St. 253; *McCausland v. Fleming*, 63 Pa. St. 36; *Spiller v. Scribner*, 36 Vt. 247; *Ferris v. Coover*, 10 Cal. 622.

not be produced in evidence. The boundary may be established by any other competent evidence.¹

§ 842. **Appurtenants.** — Whatever belongs to the thing granted as parcel thereof will pass with it, though it is not specifically referred to. Thus, houses, window-blinds, doors, mines, crops, and whatever else constitutes a part of the realty, will pass with the grant of the land, unless expressly reserved.² It is also the general rule, with very little qualification, that whatever is appendant or appurtenant to the thing granted will pass with it to the grantee as an appurtenant. All easements attached to the land granted as the dominant estate are appurtenant.³ And whether a certain right is appurtenant, depends upon the condition of the property at the time of the conveyance, and how far the right is necessary to the complete enjoyment of the property. If, therefore, certain easements or servitudes are enjoyed by the grantor in connection with the use of the land, those easements will pass to the grantee. And even where the servient estate is also his property, the equitable easement arising from the subservience of one piece of land to the other will pass to the grantee of the latter, if it is essential

¹ *Deery v. Cray*, 10 Wall. 263.

² *Farrar v. Stackpole*, 6 Me. 154; *Bracket v. Goddard*, 54 Me. 313; *Goodrich v. Jones*, 2 Hill, 142; *Cook v. Whiting*, 16 Ill. 481; *Powell v. Rich*, 41 Ill. 466; *Noble v. Bosworth*, 19 Pick. 314; *Daniels v. Pond*, 31 Pick. 367; *Terhew v. Ebberson*, 1 Pa. St. 726; *Turner v. Reynolds*, 23 Pa. St. 199; *Kittredge v. Wood*, 3 N. H. 503; *Foote v. Colvin*, 3 Johns. 216; *Mott v. Palmer*, 1 N. Y. 564; *Austin v. Sawyer*, 9 Cow. 40; *McIlvaine v. Harris*, 20 Mo. 457; *Chapman v. Long*, 10 Ind. 465; *Tripp v. Hasceig*, 20 Mich. 254; *Bond v. Coke*, 71 N. C. 97; *Ring v. Billings*, 51 Ill. 475; *Baker v. Jordan*, 3 Ohio St. 438; *Weatherbee v. Ellison*, 19 Vt. 379; *Lewis v. Lyman*, 22 Pick. 436; *Fay v. Muzzey*, 13 Gray, 53.

³ *Plant v. James*, 5 B. & Ad. 791; *Harris v. Elliott*, 10 Pet. 25; *Philbrick v. Ewing*, 97 Mass. 133; *Kent v. Wait*, 10 Pick. 138; *Pope v. O'Hara*, 48 N. Y. 455; *Jackson v. Hathaway*, 15 Johns. 447; *Pickering v. Stapler*, 5 Serg. & R. 107; *Murphy v. Campbell*, 4 Pa. St. 484; *Whalley v. Thompson*, 1 Bos. & P. 371.

to his full enjoyment of the land granted.¹ Although land cannot be said to pass as appurtenant to land, if the land, expressly granted, does not admit of a reasonable enjoyment without some adjacent land, which has been used constantly with the land granted, it will pass as parcel.² But where an easement over the adjacent land would provide for the grantee a reasonably satisfactory enjoyment of the land granted, the freehold in the soil will not pass. The grantee would only acquire an easement therein.³

§ 843. **Exception and reservation.**—An exception to a grant withdraws from the operation of the conveyance some part or parcel of the thing which is granted, and which but for the exception would have passed to the grantee under the general description. The part excepted is already in existence, and is said to *remain* in the grantor. The grant has no effect upon it. A reservation is the creation, in behalf of the grantor, of some new right issuing out of the thing granted, something which did not exist, as an independent right, before the grant.⁴ Sometimes

¹ *Brigham v. Smith*, 4 Gray, 297; *Richardson v. Bigelow*, 15 Gray, 156; *James v. Plant*, 5 A. & E. 749; *Prestcott v. White*, 21 Pick. 343; *Hapgood v. Brown*, 102 Mass. 453; *Rackley v. Sprague*, 17 Me. 281; *Woodman v. Smith*, 53 Me. 81; *Thompson v. Banks*, 43 N. H. 540; *Voorhies v. Burshard*, 55 N. Y. 102; *Wilcoxon v. McGhee*, 12 Ill. 381; *Bliss v. Kennedy*, 43 Ill. 71. See *ante*, sect. 602.

² *Woodman v. Smith*, 53 Me. 81; *Allen v. Scott*, 21 Pick. 25; *Esty v. Currier*, 98 Mass. 501; *Webster v. Potter*, 105 Mass. 414; *Whitney v. Olney*, 3 Mason, 282; *Davis v. Handy*, 37 N. H. 65; *Thompson v. Banks*, 43 N. H. 540; *Mixer v. Reed*, 25 Vt. 254; *Voorhies v. Burshard*, 55 N. Y. 102; *Blaines lessee v. Chambers*, 1 Serg. & R. 169; *Swartz v. Swartz*, 4 Pa. St. 353; *Murphy v. Campbell*, 4 Pa. St. 480; *Avon Co. v. Andrews*, 30 Conn. 476; *Wilson v. Hunter*, 17 Wis. 687; *Bacon v. Bowdoin*, 22 Pick. 401; *Webber v. Eastern R. R.*, 2 Metc. 147; *Blake v. Clark*, 6 Me. 436; *Moore v. Fletcher*, 16 Me. 66; *Jackson v. Hathaway*, 15 Johns. 447; *Riddle v. Littlefield*, 53 N. H. 508.

³ *Stetson v. Daw*, 16 Gray, 373; *Cox v. James*, 45 N. Y. 562; *Munn v. Worrall*, 53 N. Y. 46; *Bartholomew v. Edwards*, 1 Houst. 25; *Jamaica Pond v. Chandler*, 9 Allen, 164; *Leavitt v. Towle*, 8 N. H. 97; *Graves v. Amoskeag Co.*, 44 N. H. 464; *Peck v. Smith*, 1 Conn. 103; *Owen v. Field*, 102 Mass. 104.

⁴ *Greenleaf v. Birth*, 6 Pet. 302; *Pettee v. Hawes*, 13 Pick. 323; *Hurd v.*

the terms *exception* and *reservation* are used synonymously, but the distinction above given is proper and essential. A reservation is in the nature of a grant to the grantor, and therefore requires the same words of limitation as in the direct grant to the grantee. But an exception requires no words of limitation.¹ A reservation can only be made to the grantor, and must issue out of the land granted. It cannot be reserved to a stranger or out of another estate, although an attempted reservation out of another's estate may operate as an independent grant to the grantor in a deed of indenture executed by both parties.² The reservation properly appears in the *reddendum* clause of the deed, while the exception is properly incorporated in the premises, and constitutes a part of the description. But this is a mere matter of form, and is not essential or important in determining whether a clause creates an exception or a reservation. If an exception is repugnant to the original grant, it is void. Thus, if there be a specific grant of twenty acres of land, the exception of one acre will be repugnant and therefore void. But if the grant is of a tract of land, and the quantity is mentioned only accidentally, an exception of one or two acres is not repugnant, since the

Curtis, 7 Metc. 119; Dyer v. Santford, 9 Metc. 395; Stockbridge Iron Co. v. Hudson Iron Co., 107 Mass. 321; Dennis v. Wilson, 107 Mass. 591; Richardson v. Palmer, 38 N. H. 212; Emerson v. Mooney, 50 N. H. 316; Bridger v. Pierson, 45 N. Y. 601; Westpoint Co. v. Reymert, 45 N. Y. 707; Munn v. Worrall, 53 N. Y. 46; Whitaker v. Brown, 46 Pa. St. 197; Karmuller v. Krotz, 18 Iowa, 357.

¹ Seymour v. Courtenay, 5 Burr. 2814; Clapp v. Draper, 4 Mass. 266; Jamaica Pond v. Chandler, 9 Allen, 170; Putnam v. Tuttle, 10 Gray, 48; Curtis v. Gardner, 13 Metc. 461; White v. Foster, 102 Mass. 378; Stockbridge Iron Co. v. Hudson Iron Co., 107 Mass. 321; Keeler v. Wood, 30 Vt. 242; Emerson v. Mooney, 50 N. H. 316; Bean v. Coleman, 44 N. H. 542; Hornbeck v. Westbrook, 9 Johns. 73; Wheeler v. Brown, 46 Pa. St. 197; Smith v. Ladd, 41 Me. 314; Randall v. Randall, 59 Me. 339.

² Dand v. Kingscote, 6 Mees. & W. 174; Pettie v. Hawes, 13 Pick. 322; Dyer v. Sanford, 9 Metc. 395; Corning v. Troy Iron Co., 40 N. Y. 209; Bridger v. Pierson, 45 N. Y. 601; Westpoint Iron Co. v. Reymert, 45 N. Y. 707; Hill v. Lord, 48 Me. 95.

two elements of the description can be reconciled so that both can take effect.¹ And where a part or parcel of the land granted is excepted from the grant, not only that specific right or estate remains in the grantor, but every other right which is appurtenant thereto, and which is necessary to the reasonable enjoyment of the same.²

§ 844. **Habendum.** — The *habendum* is the clause which in a deed follows the words “to have and to hold,” and which defines the quantity of interest or the estate which the grantee is to have in the property granted. What are the words of limitation usually employed in limiting estates, have been already given in the preceding chapters on the different estates, and need not be repeated here. The *habendum*, although properly constituting an independent clause in a deed, is not absolutely necessary. The estate granted may be limited in the premises, and the *habendum* altogether omitted.³ And so unimportant is the *habendum*, that if it is repugnant to the limitations appearing in the premises it will have no effect; an absolutely repugnant *habendum* always yields to the terms of the premises.⁴ But if by any fair and reasonable construction the *premises* and *habendum* may be reconciled that both can stand, then effect will be given to both. If, therefore, the limitation in the premises is in general terms, as to A. and his heirs generally, and the *habendum* limits the estate to A. and the heirs of his body, since the *habendum* is not necessarily contradictory of the premises, it will have its proper effect, and

¹ Shep. Touch. 79; Cutler v. Tufts, 3 Pick. 272; Spragge v. Snow, 4 Pick. 54.

² Dand v. Kingscote, 6 Mees. & W. 174; Howard v. Wadsworth, 3 Me. 471; Sanborn v. Hoyt, 24 Me. 118; Pettee v. Hawes, 13 Pick. 322; Allen v. Scott, 21 Pick. 25.

³ 3 Washb. on Real Prop. 366, 367, 436; Co. Lit. 6 a; Kenworthy v. Tullis, 3 Ind. 96.

⁴ Flagg v. Eames, 40 Vt. 23; Nightingale v. Hidden, 7 R. I. 118; Tyler v. Moore, 42 Pa. St. 376; Walters v. Breden, 70 Pa. St. 237.

the estate granted will be an estate-tail.¹ But if the premises contain the specific limitation, and is followed by a more general limitation in the *habendum*, the latter limitation cannot enlarge the estate granted by the premises.² The *habendum* cannot serve to pass any other parcels of land than those which are described in the premises, nor to change the grantees, or their interests, so as to make them tenants in severalty, where by the premises they were tenants in common,³ although it is probable that the *habendum* may serve to change the character of a joint estate from a joint-tenancy to a tenancy in common. The *habendum* may also be made to qualify and limit the operation of the premises to any extent, if express reference is made in the premises to the intended operation of the *habendum*.⁴ The *habendum* also contains generally the declarations of the uses and trusts, subject to which the grantee is to hold the estate conveyed. But the declaration may appear in any other part of the deed and be equally effective.⁵

§ 845. **Reddendum.** — This is the clause which contains the reservations and follows the *habendum*. The subject of reservations, and their points of difference from exceptions, have already been discussed. The reservation may be of rent, or of any other easement, or other interest, or estate in land.⁶

¹ *Berry v. Billings*, 44 Me. 423; *Sumner v. Williams*, 8 Mass. 162; *Jamaica Pond v. Chandler*, 9 Allen, 168; *Ford v. Flint*, 40 Vt. 382; *Manning v. Smith*, 6 Conn. 292; *Moss v. Sheldon*, 3 Watts & S. 162.

² *Shep. Touch.* 76; *Nightingale v. Hidden*, 7 R. I. 118; *Walters v. Breden*, 70 Pa. St. 237; 3 Washb. on Real Prop. 439.

³ 4 Cruise Dig. 265; Co. Lit. 26 b, Butler's note, 154; *Greenwood v. Tyler*, Cro. Jac. 564; *Hafner v. Irwin*, 3 Dev. & B. 434.

⁴ *Moss v. Sheldon*, 3 Watts & S. 162; *Tyler v. Moore*, 42 Pa. St. 374. But it can never extend the subject-matter beyond the limitations in the premises. *Manning v. Smith*, 6 Conn. 292.

⁵ *Nightingale v. Hidden*, 7 R. I. 118; 3 Washb. on Real Prop. 440.

⁶ See *ante*, sect. 842.

§ 846. **Conditions.** — The *reddendum* in an orderly deed is followed by the condition, if one is annexed to the estate granted. What are valid conditions, and what is their legitimate effect upon the estates, to which they are attached, have been already explained.¹

¹ See *ante*, sects. 271–279.

SECTION III.

COVENANTS IN DEEDS.

SECTION 849. General statement.

- 850. Covenant of seisin and right to convey.
- 851. What facts constitute a breach.
- 852. Covenant against incumbrances.
- 853. What circumstances constitute a breach of covenant against incumbrances.
- 854. Covenant for quiet enjoyment.
- 855. Covenant of warranty.
- 856. The character of the covenant of warranty.
- 857. The feudal warranty.
- 858. Special covenants of warranty.
- 859. Implied covenants.
- 860. Who may maintain actions on covenants of warranty.
- 861. Damages, what may be recovered.
- 862. What covenants run with the land.
- 863. When breach of covenant works a forfeiture of estate.

§ 849. **General statement.** — After the parts of a deed, already explained, are usually inserted the covenants, including covenants of title.¹ As a general proposition, subject to the qualification to be hereafter mentioned, if the deed contained no express covenants of title there is no implied warranty of title, and the grantee is without remedy against the grantor if the title should fail.² Covenants of title are, therefore, generally used, and a warranty deed is generally demanded. In order that a covenant may be valid, the deed in which it is contained must be valid.³ There are five principal covenants, usually found in modern conveyances, viz.: covenants of seisin, right to convey, against

¹ See *post*, sect. 859.

² 3 Washb. on Real Prop. 447; Williams on Real Prop. 443, 447.

³ Co. Lit. 386 a; 3 Washb. on Real Prop. 447; *Scott v. Scott*, 70 Pa. St. 248.

incumbrances, for quiet enjoyment, and warranty. In the Western and Southern States the last covenant is generally the only one employed. But the others are recognized in all the States, and in the Northern and Middle States, except Pennsylvania, it is customary to employ most, if not all, of the covenants above enumerated.¹ Covenants of seisin and the right to convey are held to be practically synonymous, and may be discussed together.² Where the deed shows specifically what is the quantity of estate granted, the covenants cannot, by variation in the description of the estate, enlarge it. But if there is a general grant without special words of limitation, a general covenant of warranty to the grantee and his heirs may act as an estoppel in passing the inheritance to the grantee, although words of limitation are required in the creation of a fee, and there are none in the premises or the *habendum*.³

§ 850. **Covenants of seisin and right to convey.** — This is a general covenant that the grantor is lawfully seised, and had a right to convey at the time of the conveyance. If the grantor is not then possessed of the legal title, and is not in possession of the premises, the covenant is broken as soon as made, and the grantee, and *no one else*, may at once bring an action for the breach.⁴ If the grantor has posses-

¹ Williams on Real Prop. 447, Rawle's note; Colby v. Osgood, 29 Barb. 339; Foote v. Burnett, 10 Ohio, 317; Caldwell v. Kirkpatrick, 6 Ala. 60; Funk v. Cresswell, 5 Iowa, 62; Van Wagner v. Van Nostrand, 19 Iowa, 426; Armstrong v. Darby, 26 Mo. 517.

² Slater v. Rawson, 1 Metc. 455; Prescott v. Trueman, 4 Mass. 627; Raymond v. Raymond, 10 Cush. 134; Griffin v. Fairbrother, 10 Me. 91; Brandt v. Foster, 5 Iowa, 294. *Contra*, Richardson v. Dorr, 5 Vt. 21.

³ Ferrett v. Taylor, 9 Cranch, 53; Blanchard v. Brooks, 12 Pick. 67; Mills v. Catlin, 22 Vt. 104; Shaw v. Galbraith, 7 Pa. St. 111; Ross v. Adams, 28 N. J. L. 168; Adams v. Ross, 30 N. J. L. 509.

⁴ Pollard v. Dwight, 4 Cranch, 430; Bartholomew v. Candee, 14 Pick. 170; Slater v. Rawson, 1 Metc. 450; Garfield v. Williams, 2 Vt. 327; Mitchell v. Warner, 5 Conn. 497; Greenby v. Wilcocks, 2 Johns. 1; Dickinson v. Hoopes, 8 Gratt. 397; Backus v. McCoy, 3 Ohio, 218; Devore v. Sunderland, 17 Ohio, 60.

sion at the time, but holds adversely to the owner of the paramount title, it has been generally held that the mere existence of an outstanding title does not constitute a breach of the covenant. But whether such adverse possession and defeasible seisin are a sufficient compliance with the obligation of the covenant, has met with a different construction by the different courts. It has been held in some, perhaps most of the States, that the covenant of lawful seisin is satisfied by the possession of actual seisin, though it is tortiously acquired, and that a subsequent eviction of the tenant constitutes no breach of the covenant of seisin.¹ If this be the proper construction, then a covenant of seisin, or of *lawful* seisin, is broken, if at all, as soon as it is made, and, in conformity with the general common-law rule in respect to the non-assignability of broken covenants, cannot pass to the assignees of the grantee. If the covenant is broken, the grantee has nothing which he can convey.² But it is maintained by the courts of England, and some of the United States, that a covenant of *lawful* seisin is both present and future in its operation, that if the grantor has the actual seisin it is not immediately broken, but is subsequently broken if the grantee or his assigns are evicted by the assertion of the paramount title. Being future in its operation, it is held in those States to pass to the assignee with a grant of the estate.³ The failure to distinguish between a

¹ *Greenby v. Wilcocks*, 2 Johns. 1; *Withy v. Munford*, 5 Cow. 137; *Beddoe v. Wadsworth*, 21 Wend. 124; *Marston v. Hobbs*, 2 Mass. 433; *Raymond v. Raymond*, 10 Cush. 134; *Clark v. Swift*, 3 Metc. 390; *Moore v. Merrill*, 17 N. H. 79; *Griffin v. Fairbrother*, 10 Me. 95; *Wilson v. Widenham*, 51 Me. 567; *Mitchell v. Warner*, 5 Conn. 497; *Wilson v. Cochrane*, 46 Pa. St. 229; *Redwine v. Brown*, 10 Ga. 314; *Wilson v. Forbes*, 2 Dev. 30; *Birney v. Hann*, 3 A. K. Marsh. 324; *Wheaton v. East*, 5 Yerg. 41; *Richard v. Brent*, 59 Ill. 45; 14 Am. Rep. 1; *Dale v. Shively*, 8 Kan. 276; *Salmon v. Vallejo*, 41 Cal. 481.

² *Redwine v. Brown*, 10 Ga. 311; *Ross v. Turner*, 7 Ark. 132; and other cases cited in note (8.)

³ *Kingdon v. Nottle*, 1 Maule & S. 355; *Richardson v. Dorr*, 5 Vt. 210; *Martin v. Baker*, 5 Blackf. 232; *Coleman v. Lyman*, 42 Ind. 289; *Backus v. McCoy*, 3 Ohio, 218; *Great Western, etc., Co. v. Saas*, 24 Ohio St. 542; *Parker v.*

covenant of *lawful* seisin and of *indefeasible* seisin in the earlier cases no doubt gave rise to this variance of judicial opinion. The better, and what is deemed to be the American, doctrine is that the covenant of *lawful* seisin does not covenant for the conveyance of an indefeasible estate, and is, therefore, not broken by a subsequent eviction of the grantee. To hold that the covenant of seisin means an indefeasible seisin would give to that covenant the same extensive operation as the covenant of warranty. Everywhere in the United States, if the grantor expressly or impliedly covenants that he is seised of an *indefeasible* estate, it is a future covenant and runs with the land. Any one who holds under the covenantee may sue on the covenant, whenever he has been evicted by the paramount title.¹

§ 851. **What facts constitute a breach.**—The covenant of seisin is defined to be an assurance that he has the very estate, both in quantity and quality, which he professes to convey.² So if the grantor expressly conveys only the lands, “whereof he was seised on” a certain day, the covenant of seisin is not broken if other lands fall under the general description, of which he did not have the seisin.³ Therefore, any outstanding right or title which diminishes the quality or quantity of the technical seisin will be a breach of the covenant. It will be broken if the estate is less in duration or quantity than what is described.⁴ So, also, if the estate described is

Brown, 15 N. H. 176; Partridge v. Hatch, 18 N. H. 498; Brandt v. Foster, 5 Iowa, 294; Schofield v. Homestead Co., 32 Iowa, 317; 7 Am. Rep. 197.

¹ Garfield v. Williams, 2 Vt. 328; Preston v. Trueman, 4 Mass. 627; Smith v. Strong, 14 Pick. 123; Raymond v. Raymond, 10 Cush. 134; Abbott v. Allen, 14 Johns. 248; Stanard v. Eldridge, 16 Johns. 254; Lockwood v. Sturdevant, 6 Conn. 373; Bender v. Fromberger, 4 Dall. 436; Wilson v. Forbes, 2 Dev. 30; Kincaid v. Brittain, 5 Sneed, 123; Collier v. Gamble, 10 Mo. 467; Magwire v. Riggan, 44 Mo. 512.

² Howell v. Richards, 11 East, 641; Pecare v. Chouteau, 13 Mo. 527.

³ Thomas v. Perry, Pet. C. Ct. 49.

⁴ Downer v. Smith, 38 Vt. 468; Lindley v. Dakin, 13 Ind. 388; Phipps v. Tarpley, 24 Miss. 597; Kellogg v. Malin, 50 Mo. 496; Brandt v. Foster, 5

not, to any extent, the property of the grantor.¹ The covenant is also broken where the land conveyed has upon it fences, buildings, and other erections belonging to other persons, if there is no restraining clause in the deed.² But, on the other hand, easements, the exercise of which does affect the technical seisin of the grantee, such as a right of way, a public highway, or railroad, will not constitute a breach of the covenant.³ An outstanding judgment, mortgage, or right of dower, does not constitute a breach of the covenant, and in the case of a mortgage, it does not matter whether the mortgage is construed to be a conveyance or only a lien.⁴ But if the grantee is himself seised, he will be estopped from setting up his seisin in an action for the breach of the covenant of seisin.⁵

§ 852. **Covenants against incumbrances.** — This covenant is intended to provide security against the assertion of “every right to, or interest in the land, which may subsist in third persons, but consistent with the passing of the fee

Iowa, 294; *Van Wagner v. Van Nostrand*, 19 Iowa, 422; *Mott v. Palmer*, 1 N. Y. 564; *Wilson v. Forbes*, 2 Dev. 35; *Wilder v. Ireland*, 8 Jones L. 90; *Sedgwick v. Hollinback*, 7 Johns. 376; *Wheeler v. Hatch*, 12 Me. 389; *Comstock v. Comstock*, 23 Conn. 352.

¹ *Wheelock v. Thayer*, 16 Pick. 68; *Basford v. Pearson*, 9 Allen, 389; *Bacon v. Lincoln*, 4 Cush. 210; *Morrison v. McArthur*, 43 Me. 567.

² *Mott v. Palmer*, 1 N. Y. 564; *Tift v. Horton*, 53 N. Y. 377; *Powers v. Dennison*, 30 Vt. 752; *West v. Stewart*, 7 Pa. St. 122; *Van Wagner v. Van Nostrand*, 19 Iowa, 427.

³ *Whitbeck v. Cook*, 15 Johns. 483; *Mills v. Catlin*, 22 Vt. 98; *Lewis v. Jones*, 1 Pa. St. 336; *Fitzhugh v. Croghan*, 2 J. J. Marsh. 429; *Vaughn v. Stuzaker*, 16 Ind. 340; *Kellogg v. Malin*, 50 Mo. 496; 11 Am. Rep. 426. But it has been held to be broken by an outstanding right to use the water of a spring. *Lamb v. Danforth*, 59 Me. 324; *Clark v. Conroe*, 38 Vt. 469. And by a right to restrain the damming of water. *Traster v. Nelson*, 29 Ind. 96; *Walker v. Wilson*, 13 Wis. 522; *Hall v. Gale*, 14 Wis. 55.

⁴ *Sedgwick v. Hollenback*, 7 Johns. 376; *Stanard v. Eldridge*, 16 Johns. 254; *Lewis v. Lewis*, 5 Rich. L. 12; *Massey v. Craine*, 1 McCord, 489; *Tuite v. Miller*, 10 Ohio, 383; *Reasoner v. Edmundson*, 5 Ind. 394. But see *Voorhis v. Forsythe*, 4 Biss. 409.

⁵ *Fitch v. Baldwin*, 17 Johns. 161; *Furness v. Williams*, 11 Ill. 229.

by the conveyance.”¹ The same contrariety of opinion exists as to the character of covenants against incumbrances as was discovered in regard to the character of covenants of seisin, viz.: whether the covenant is one *in presenti*, broken, if at all, as soon as it is made, and, therefore, does not pass to the grantee’s assigns; or whether it is a future covenant, and, therefore, enforceable by whoever is injured by the incumbrance. The generally prevailing doctrine in this country is that it is a covenant *in presenti*, and does not run with the land.² But in some of the States of this country it is held to be a covenant *in futuro*, and, therefore, one running with the land. The covenant is broken when the outstanding right is enforced.³ Probably this variance of opinion, as in the case of covenants of seisin, originated in a failure to note carefully the distinction between a covenant that the estate *is free* from incumbrances, and a covenant that the grantee shall *enjoy* the estate free from incumbrances. The latter is practically a covenant for quiet enjoyment, and being future in character, passes with the land to the grantee’s assigns.⁴ The grantee or his assignee may

¹ 2 Greenl. on Ev., sect. 242; *Prescott v. Trueman*, 4 Mass. 627; *Cary v. Daniels*, 8 Metc. 482; *Bronson v. Coffin*, 108 Mass. 175; *Mitchell v. Warner*, 5 Conn. 527.

² *Clark v. Swift*, 3 Metc. 392; *Thayer v. Clemence*, 22 Pick. 490; *Whitney v. Dinmore*, 6 Cush. 127; *Runnels v. Webster*, 59 Me. 488; *Russ v. Perry*, 49 N. H. 547; *Potter v. Taylor*, 6 Vt. 676; *Stewart v. Drake*, 9 N. J. L. 139; *Garrison v. Sanford*, 12 N. J. L. 261; *Funk v. Voneida*, 11 Serg. & R. 109; *Cathcart v. Bowman*, 5 Pa. St. 317; *Frink v. Bellis*, 33 Ind. 135; *Funk v. Cresswell*, 5 Clarke Ch. 62; *Pillsbury v. Mitchell*, 5 Wis. 17. See *Richard v. Bent*, 59 Ill. 38; 14 Am. Rep. 1.

³ *Foote v. Burnett*, 10 Ohio, 317. See *Sprague v. Baker*, 17 Mass. 586; *McCrady v. Brisbane*, 1 Nott & M. 104. In Iowa and Illinois, although the courts take the position that the covenant against incumbrance is a covenant *in presenti*, they hold that it runs with the land, and will support an action by the second or third grantee under the covenant. *Kradler v. Sharp*, 36 Ill. 236; *Richard v. Bent*, 59 Ill. 38; 14 Am. Rep. 1.

⁴ *Rawle Cov.* 92; *Lethbridge v. Mytton*, 2 B. & Ad. 772; *Hall v. Deane*, 13 Johns. 105; *Greene v. Creighton*, 7 R. I. 1; *Hutchins v. Moody*, 30 Vt. 658; *Carter v. Denman*, 23 N. J. L. 273; *Grice v. Scarborough*, 2 Spears, 649; *Anderson v. Knox*, 20 Ala. 156.

recover whatever loss he may have sustained by the enforcement of the incumbrance, and where the covenant takes the form of an obligation to *discharge* incumbrances, the right of action accrues immediately upon the covenantor's failure to perform.¹ If it be an ordinary covenant against incumbrances, the grantee can only obtain nominal damages, unless he can show that he has suffered an actual loss. If the incumbrance be a mortgage or other future claim, the damages will be nominal, unless the mortgage or other lien is enforced before the action on the covenant is instituted. But if the incumbrance is a pre-existing easement, substantial damages may be recovered at any time.²

§ 853. **What circumstances constitute a breach of covenant against incumbrances.** — The following may be mentioned as the more prominent examples of incumbrances, the existence of which will constitute a breach of the covenant, supplementing them by the statement that there are others, and that every outstanding right which comes under the definition of an incumbrance above given would be a breach of the covenant: An inchoate right of dower;³ a judgment lien;⁴ an outstanding mortgage;⁵ taxes, when ascertained and determined;⁶ an out-

¹ 3 Washb. on Real Prop. 464; *Gardner v. Niles*, 16 Me. 280; *Jennings v. Morton*, 35 Me. 309; *Gilbert v. Wiman*, 1 N. Y. 550; *Booth v. Starr*, 1 Conn. 249; *Lathrop v. Atwood*, 21 Conn. 123; *Dorsey v. Dashiell*, 1 Md. 204; *Hogan's Ex'ors v. Calvert*, 21 Ala. 199.

² *Whitney v. Dinsmore*, 6 Cush. 124; *Churchill v. Hunt*, 3 Denio, 321; *Ardesco Oil Co. v. N. A. Mining Co.*, 66 Pa. St. 375; *Richard v. Bent*, 59 Ill. 38; 14 Am. Rep. 1.

³ *Shearar v. Ranger*, 22 Pick. 447; *Jenks v. Ward*, 4 Metc. 412; *Fletcher v. State Bank*, 37 N. H. 397; *McAlpine v. Woodruff*, 11 Ohio St. 120. But see *Bigelow v. Hubbard*, 97 Mass. 198; *Bostwick v. Williams*, 36 Ill. 69.

⁴ *Jenkins v. Hopkins*, 8 Pick. 346; *Hall v. Dean*, 13 Johns. 105.

⁵ *Bean v. Mayo*, 5 Me. 94; *Freeman v. Foster*, 55 Me. 508; *Brooks v. Moody*, 25 Ark. 452.

⁶ *Rundell v. Lakey*, 40 N. Y. 514; *Barlow v. St. Nicholas Bank*, 63 N. Y. 399; *Cochrane v. Guild*, 106 Mass. 29; *Hill v. Bacon*, 110 Mass. 388; *Pierce v. Brew*, 43 Vt. 292; *Long v. Moler*, 5 Ohio St. 271; *Almy v. Hunt*, 48 Ill. 45; *Ingalls v. Cook*, 21 Iowa, 560; *Peters v. Myers*, 22 Wis. 602.

standing lease in possession;¹ conditions and covenants, restricting the use of premises.² And it may be stated that pre-existing easements upon the land will constitute breaches of the covenant against incumbrances. Among them may be mentioned railroads, private rights of way, rights to artificial water-courses, to cut trees, to mine, to maintain dams and aqueducts, etc.³ Although it has been denied in New York, Pennsylvania and Wisconsin,⁴ the prevailing doctrine is that the existence of a public or highway over the land is a breach of the covenant, even though the grantee knew of its existence.⁵ Any one of these circumstances will constitute a breach of the covenant, even though the grantee is aware of its existence when he took the deed and paid the consideration.⁶

¹ *Gale v. Edwards*, 52 Me. 360; *Batchelder v. Sturgis*, 3 Cush. 201; *Weld v. Traip*, 14 Gray, 330; *Porter v. Bradley*, 7 R. I. 538; *Cross v. Noble*, 67 Pa. St. 77; *Grice v. Scarborough*, 2 Spears, 649.

² *Plymouth v. Carver*, 16 Pick. 183; *Parish v. Whitney*, 3 Gray, 516; *Bronson v. Coffin*, 108 Mass. 175; *Burbank v. Pillsbury*, 48 N. H. 475; *Kellogg v. Robinson*, 6 Vt. 276.

³ *Spurr v. Andrews*, 6 Allen, 420; *Prescott v. White*, 21 Pick. 341; *Lamb v. Danforth*, 59 Me. 322; 8 Am. Rep. 426; *Brooks v. Curtis*, 50 N. Y. 639; 10 Am. Rep. 545; *Russ v. Steele*, 40 Vt. 310; *Smith v. Sprague*, 40 Vt. 310; *Cathcart v. Bowman*, 5 Pa. St. 319; *Wilson v. Cochrane*, 46 Pa. St. 233; *Mitchell v. Warner*, 5 Conn. 497; *Kutz v. McCune*, 22 Wis. 628; *Burk v. Hill*, 48 Ind. 52; 17 Am. Rep. 731; *Barlow v. McKinley*, 24 Iowa, 70; *Beach v. Miller*, 51 Ill. 206; 2 Am. Rep. 290; *Kellogg v. Malin*, 50 Mo. 496; 11 Am. Rep. 426.

⁴ *Whitbeck v. Cook*, 15 Johns. 483; *Patterson v. Arthur*, 9 Watts, 152; *Wilson v. Cochrane*, 46 Pa. St. 229; *Kutz v. McCune*, 22 Wis. 628.

⁵ *Haynes v. Young*, 36 Me. 557; *Lamb v. Danforth*, 59 Me. 322; 8 Am. Rep. 426; *Kellogg v. Ingersoll*, 2 Mass. 101; *Parish v. Whitney*, 3 Gray, 516; *Butler v. Gale*, 27 Vt. 739; *Hubbard v. Norton*, 10 Conn. 422; *Burk v. Hill*, 48 Ind. 52; 17 Am. Rep. 731; *Beach v. Miller*, 51 Ill. 206; 2 Am. Rep. 290; *Kellogg v. Malin*, 50 Mo. 496; 11 Am. Rep. 426.

⁶ *Hoovey v. Newton*, 7 Pick. 29; *Harlow v. Thomas*, 15 Pick. 68; *Funk v. Voneida*, 11 Serg. & R. 112; *Hubbard v. Norton*, 10 Conn. 431; *Long v. Moler*, 5 Ohio St. 271; *Medler v. Hiatt*, 8 Ind. 171; *Snyder v. Lane*, 10 Ind. 424; *Beach v. Miller*, 51 Ill. 206; 2 Am. Rep. 290; *Dunn v. White*, 1 Ala. 645; *Kincaid v. Brittain*, 5 Sneed, 119. *Contra*, *Hutz v. McCune*, 22 Wis. 628.

§ 854. **Covenant for quiet enjoyment.** — This covenant is “an assurance against the consequences of a defective title, and of any disturbances thereupon.”¹ The covenant for quiet enjoyment is in common use in England, and in the United States it is commonly met with in leases. But in the ordinary conveyance of freeholds it is almost altogether superseded by the covenant of warranty, from which it cannot be materially distinguished.² The operation of the two covenants being almost identical, an exhaustive statement will not be needed here. It suffices to say, that nothing but actual or constructive eviction, by the assertion of the paramount title, will constitute a breach of this covenant.³

§ 855. **Covenant of warranty.** — As has been stated in the preceding paragraph, covenants for quiet enjoyment and of warranty are practically identical in their operation. An attempt has been made to distinguish them by the statement that the former relates to the possession and the covenant is broken by an eviction of *lawful right*; while the covenant of warranty relates to the title, and requires the eviction to be by *paramount* title as well as by lawful right, in order to constitute a breach.⁴ But since an eviction can be lawful only under a paramount title, it is difficult to see in what this supposed difference lies. The same acts which will constitute a breach of one covenant will be a breach of the other also. In order that the covenants may be broken, there must be an *actual* or *constructive* eviction of the whole

¹ Howells v. Richards, 11 East, 633.

² Rawle Cov. 125.

³ Smith v. Shepard, 15 Pick. 147; Drew v. Towle, 30 N. H. 537; Russ v. Steele, 40 Vt. 315; Sterling v. Peet, 14 Conn. 254; Cowdrey v. Coit, 44 N. Y. 382; 4 Am. Rep. 690; Ross v. Dysart, 33 Pa. St. 452; Hand v. Armstrong, 34 Ga. 232; Murphy v. Price, 48 Mo. 250; Moore v. Vail, 17 Ill. 190; Johnson v. Nyce, 17 Ohio, 66; Clark v. Lineberger, 44 Ind. 223; Pence v. Duval, 9 B. Mon. 49; Thomas v. Stickley, 32 Iowa, 76; McGary v. Hastings, 39 Cal. 360; 2 Am. Rep. 456. See *ante*, sects. 187, 195, 196.

⁴ Fowler v. Poling, 6 Barb. 165.

or a part of the premises.¹ But the grantee need not resist the claim of the contestant until he has been evicted by process of law. He may voluntarily yield the possession upon demand of the owner of the paramount title.² But he does this at his peril, and the burden of proof in a subsequent action on the covenant lies on him to show, that the title to which he yielded possession was really the paramount title.³ A judgment in ejectment is a breach of the covenant, and the grantee need not wait to be actually evicted.⁴ But in all these cases the covenant is not broken by eviction, unless under a lawful and paramount title.⁵ And there will be no breach of the covenant, if land is confiscated in the exercise of the right of eminent domain.⁶ It matters not what may be the nature of the paramount claim. If it is paramount, and the enforcement of it will take a portion, or the whole of the land conveyed, or will diminish the

¹ *West v. Stewart*, 7 Pa. St. 122; *Funk v. Cresswell*, 5 Iowa, 88; *Mott v. Palmer*, 1 N. Y. 564; *Beebe v. Swartwout*, 8 Ill. 179; *Bostwick v. Williams*, 36 Ill. 69. In South Carolina the existence of a paramount title in a third person is sufficient, without eviction, to constitute a breach of the covenant. *Biggus v. Bradley*, 1 McCord, 500; *Mackey v. Collins*, 2 Nott & M. 186.

² *Knepper v. Kurtz*, 58 Pa. St. 484; *Clarke v. McAnulty*, 3 Serg. & R. 364; *Sprague v. Baker*, 17 Mass. 586; *Hamilton v. Cutts*, 4 Mass. 349; *Gilman v. Haven*, 11 Cush. 330; *Greenvault v. Davis*, 4 Hill, 643; *Kellogg v. Platt*, 33 N. J. 328; *Loomis v. Bedell*, 11 N. H. 73; *Peck v. Hensley*, 20 Texas, 673; *Claycomb v. Munger*, 51 Ill. 376; *McGary v. Hastings*, 39 Cal. 360; 2 Am. Rep. 456. *Contra*, *Ferris v. Harshea*, Mart. & Y. 52.

³ *Stone v. Hooker*, 9 Cow. 154; *Smith v. Shepard*, 15 Pick. 147; *Clark v. McAnulty*, 3 Serg. & R. 364; *Crance v. Collenbaugh*, 47 Ind. 256.

⁴ *Loughran v. Ross*, 45 N. Y. 792; *Cowdrey v. Coit*, 44 N. Y. 382; 4 Am. Rep. 690; *Noonan v. Lee*, 2 Black, 499; *Gleason v. Smith*, 41 Vt. 293; *Kincaid v. Brittain*, 5 Sneed, 124; *Hannah v. Henderson*, 4 Ind. 174; *Hale v. New Orleans*, 13 La. An. 499; *King v. Kerr's Adm'rs*, 5 Ohio, 158; *Norton v. Jackson*, 5 Cal. 263; *Williams v. Weatherbee*, 1 Ark. 233.

⁵ *Gleason v. Smith*, 41 Vt. 296.

⁶ *Brown v. Jackson*, 3 Wheat. 452; *Blanchard v. Brooks*, 12 Pick. 47; *Sweet v. Brown*, 12 Metc. 175; *Raymond v. Raymond*, 10 Cush. 132; *Hall v. Chaffee*, 14 N. H. 215; *Peck v. Jones*, 70 Pa. St. 83; *Adams v. Ross*, 30 N. J. L. 510; *Doe v. Dowdall*, 3 Houst. 380; *White v. Brocaw*, 14 Ohio St. 344; *Gee v. Moore*, 14 Cal. 474; *Kimball v. Temple*, 25 Cal. 452.

value of it by restricting the enjoyment of it, the assertion of the claim will be a breach of the covenant. Therefore, an outstanding right to an easement, conditions restraining the use of the land, a mortgage or other lien, a wife's or widow's dower, and the like, will constitute a breach of the covenant of warranty, when they are enforced.¹

§ 856. **The character of the covenant of warranty.**

The covenant of warranty in its present character is a modern covenant of title, and is an adaptation of an old English covenant to American wants. It is now the most common covenant of title, and in the Southern and Western States the only one in general use. This is a personal obligation, binding the warrantor and his personal representatives, and binds his heirs and devisees only when they are expressly mentioned, and then only to the extent of the assets received by them from the warrantor. And as a personal covenant, it may be barred by the Statute of Limitations.² If the covenant is broken, as will be more fully explained in a subsequent paragraph, the covenantee is entitled to an action for damages against the covenantor.³ But a different remedy was provided in the case of

¹ *Lamb v. Danforth*, 59 Me. 324; 8 Am. Rep. 426; *Haynes v. Young*, 36 Me. 561; *Day v. Adams*, 42 Vt. 510; *Russ v. Steele*, 40 Vt. 310; *Harlow v. Thomas*, 15 Pick. 66; *Tuft v. Adams*, 8 Pick. 547; *White v. Whitney*, 3 Metc. 81; *Estabrook v. Smith*, 6 Gray, 572; *Cowdry v. Coit*, 44 N. Y. 382; 4 Am. Rep. 690. But see *Hendricks v. Stark*, 37 N. Y. 106; *Janes v. Jenkins*, 34 Md. 1; 6 Am. Rep. 300; *Hill v. Bacon*, 110 Mass. 388; *Flynn v. Williams*, 1 Ired. L. 509; *Southerland v. Stout*, 68 N. C. 446; *Moore v. Vail*, 17 Ill. 185. But an incumbrance, which the grantee undertakes to pay, will not work a breach of the covenant. *Stebbins v. Hall*, 29 Barb. 524; *Belmont v. Coman*, 22 N. Y. 438; *Gage v. Brewster*, 31 N. Y. 221; *Trotter v. Hughes*, 2 Vt. 74; *Allen v. Lee*, 1 Ind. 58; *Pitman v. Conner*, 27 Ind. 337.

² *Cole v. Raymond*, 9 Gray, 17; *Holden v. Fletcher*, 6 Curtis, 235; *Emerson v. Prop'rs, etc.*, 1 Mass. 464; *Townsend v. Morris*, 6 Cow. 126; *Dobbins v. Brown*, 12 Pa. St. 75; *Caldwell v. Kirkpatrick*, 6 Ala. 60; *Williams v. Wetherbee*, 1 Ark. 233; *Athens v. Nale*, 25 Ill. 198; *Bostwick v. Williams*, 36 Ill. 70.

³ See *post*, sect. 861.

§ 857. **The feudal warranty** — Of which the modern warranty is a descendant. The feudal warranty grew out of the relation of lord and vassal. Upon receiving the homage of the vassal the lord pledged himself to warrant and defend the title to the vassal's lands, and provide him with others of equal value if he were ousted of his lands by a paramount title. If the vassal or tenant was evicted he could call upon the lord for some more lands, as compensation for those which he had lost. But there was no action for damages.¹ The ancient feudal warranty has long since become obsolete, and has been replaced by the personal covenant above described.² In only one respect does the modern covenant bear any very close and striking resemblance to the feudal warranty; and that is, in its operation as an estoppel, to bind an after acquired title in the hands of the warrantor and privies, and prevent its enforcement against the grantee. Wherever a grantor undertakes to convey an estate to which he has no title, if the deed contains a covenant of warranty, he is estopped from setting up an adverse title which he has subsequently acquired. And this is the case, even though the grantee has by his deed acquired neither title nor possession. The grantee may maintain ejectment against the grantor so soon as he has acquired the title and possession. Or, if the grantor has only acquired the title and the land is in possession of a third person, he may maintain an equitable suit for a conveyance of the newly acquired title.³ The heirs are bound by the covenant of warranty as an estop-

¹ 3 Washb. on Real Prop. 468.

² Co. Lit. 384 a, Butler's note, 332; Marston v. Hobbs, 2 Mass. 432; Gore v. Brazier, 3 Mass. 523; Townsend v. Morris, 6 Cow. 126; Caldwell v. Kirkpatrick, 6 Ala. 69; 4 Kent's Com. 472; 3 Washb. on Real Prop. 468, 469.

³ Terrett v. Taylor, 9 Cranch, 53; Allen v. Sayward, 5 Me. 231; Bates v. Norcross, 17 Pick. 144; White v. Patten, 24 Pick. 324; Jackson v. Murray, 12 Johns. 201; Jackson v. Stevens, 13 Johns. 316; Baxter v. Bradbury, 20 Me. 260; Cotton v. Ward, 3 B. Mon, 304; Jones v. King, 25 Ill. 388; King v. Gilson, 32 Ill. 353; Hope v. Stone, 10 Minn. 141. See, also, *ante*, sects. 727-731.

pel, in respect to the lands acquired by descent from the ancestor who warranted, but are not estopped from setting up an adverse title acquired by purchase, although they will be liable in an action on the covenant to the extent of the property received by them from the ancestor.¹

§ 858. **Special covenants of warranty.**—So far only general covenants of warranty have been referred to; that is, covenants in which the grantor covenants to warrant and defend the title against the lawful adverse claims of all persons whomsoever. But the covenant need not always be general. It may be *special* limited to the actions and claims of certain persons. Thus, a covenant against all persons claiming by, through, or under, the grantor is a special covenant, and a paramount title against the grantor, not created by himself, is no breach of the covenant. And if the grantor, after conveying with special warranty, in which he only covenants against any defects in the title resulting from his *past* transactions, acquires the paramount title, he may set it up against his grantees and assigns. He is not estopped by this special warranty.² In the same manner the operation of the covenant of warranty may be limited by the description of the subject-matter of the conveyance. Thus, if a deed purports to convey in terms the right, title and interest of the grantor to the land described, instead of conveying in terms the land itself, a general covenant of warranty will be limited to that right or interest, and will not be broken by the enforcement of a paramount title outstanding against the grantor at the

¹ *Oliver v. Piatt*, 3 How. 412; *Potter v. Potter*, 1 R. I. 43; *Bates v. Norcross*, 17 Pick. 14; *Cole v. Raymond*, 9 Gray, 217; *Torrey v. Minor*, 1 Smed. & M. Ch. 489.

² *Davenport v. Lamb*, 13 Wall. 418; *Allen v. Sayward*, 5 Me. 221; *Jackson v. Peck*, 4 Wend. 300; *Woodcock v. Bennet*, 1 Cow. 711; *Jackson v. Winslow*, 9 Cow. 13; *Comstock v. Smith*, 13 Pick. 116; *Trull v. Eastman*, 3 Metc. 124.

time of the conveyance.¹ But this position is assailed, and not without good grounds, by other authorities.² Mr. Washburn says: "Nor is it easy to see what the office or purpose of a covenant of warranty can be when whatever is granted infallibly passes, and can never be lawfully diverted by any future lawful act or right of any one. The grantor cannot reclaim or disturb what he has expressly granted; nor could any one acquire any right to disturb his grantee by any deed which the grantor might subsequently make."³ Another important question connected with the present subject, and one involving at times considerable doubt, is whether an exception in the operation of one of two or more covenants in a deed will be extended to others, so as to restrict their operation. Thus, if a deed contains a covenant against incumbrances, except as to a certain mortgage, followed by a general covenant of warranty, will that exception apply to the warranty, so that foreclosure under that mortgage will not constitute a breach of the covenant of warranty. This question is always determined by ascertaining the declared or implied intention of the grantor. If the two covenants are given in the same connection, and from that close connection it can be implied that the parties intended the exception to apply to both covenants, both will be treated as special covenants. While, on the contrary, the latter covenant will be general and unaffected by the exception, if there does not appear on the deed to be any intimate connection between the two covenants and the exception. In

¹ *Brown v. Jackson*, 3 Wheat. 452; *Van Rensselaer v. Kearney*, 11 How. 325; *Sweet v. Brown*, 12 Mete. 175; *Raymond v. Raymond*, 10 Cush. 132; *Hoxie v. Finney*, 16 Gray, 332; *Blodgett v. Hildreth*, 103 Mass. 488; *Bates v. Foster*, 59 Me. 155; *Freeman v. Foster*, 55 Me. 508; *McNear v. Comber*, 18 Iowa, 14; *Williamson v. Test*, 24 Iowa, 139; *White v. Brocaw*, 14 Ohio St. 344; *Adams v. Ross*, 30 N. J. L. 510; *Hope v. Stone*, 10 Minn. 152; *Gee v. Moore*, 14 Cal. 474.

² *Loomis v. Bedel*, 11 N. H. 74; *Mills v. Catlin*, 22 Vt. 104; *Funk v. Cresswell*, 5 Iowa, 66; *Rowe v. Heath*, 23 Texas, 614.

³ 3 Washb. on Real Prop. 477.

Howells *v.* Richards the court say: "He (the grantor) might, from motives of prudence, be unwilling to subject himself to a suit for the existence of an incumbrance, which he is willing to covenant shall never be suffered to disturb his grantee." Where the exception expressly refers to the covenant of seisin or against incumbrances, the presumption is very strong that it does not apply to the covenants for quiet enjoyment or of warranty.¹

§ 859. **Implied covenants.** — At common law the operative word "give" in a deed of feoffment raised by implication of law a covenant of warranty during the life of the grantor.² And so also is there an implied warranty in the old technical conveyance *exchange*.³ So also are there implied covenants in leases.⁴ But, as a general rule, in the conveyance of freehold estates in this country there are no implied covenants, since the deeds in common use are those which operate under the Statute of Uses, and they do not raise covenants by implication.⁵ But in a number of the States, notably Alabama, Arkansas, California, Delaware, Illinois, Iowa, Mississippi, Missouri and Pennsylvania, statutes have been enacted whereby the "operative words," "grant, bargain and sell," imply general covenants of seisin, against incumbrances, and of warranty or quiet enjoyment. The statutes vary somewhat as to details, but are similar in

¹ Howells *v.* Richards, 11 East, 634; Smith *v.* Compton, 3 B. & Ad. 189; Sumner *v.* Williams, 8 Mass. 162; Estabrook *v.* Smith, 6 Gray, 572; Cornell *v.* Jackson, 3 Cush. 506; Funk *v.* Voneida, 11 Serg. & R. 109; Alexander *v.* Schreiber, 10 Mo. 460; Rowe *v.* Heath, 23 Texas, 614.

² Kent *v.* Welch, 7 Johns. 258; Frost *v.* Raymond, 2 Caines, 188.

³ Dean *v.* Shelley, 57 Pa. St. 427; Bixler *v.* Sayler, 68 Pa. St. 148. But this was the case only with the technical conveyance, called *exchange*. There was no implied covenant of title, if the exchange was effected by means of mutual deeds of bargain and sale. Gamble *v.* McClure, 69 Pa. St. 284.

⁴ See *ante*, sects. 187-190.

⁵ Allen *v.* Sayward, 5 Me. 227; Bates *v.* Foster, 59 Me. 157; Sanford *v.* Travers, 40 N. Y. 140; Ricket *v.* Dickens, 1 Murph. 343; De Wolf *v.* Hayden, 24 Ill. 529; Walk. Am. Law. 381; 3 Washb. on Real Prop. 489.

general effect.¹ Whether these statutory covenants are restrained in their operation by the assertion of a special express covenant, is not clearly determined. There can, of course, be in a deed both express and implied covenants, and both can stand if they are consistent. But if they are inconsistent, the natural rule would be that the implied covenant would yield to the express covenant.² And although this rule seems to be supported by the authorities in the abstract, it is difficult at times to reconcile their decisions in the particular case with the rule above stated.³ The safest course, in making a conveyance with special covenants, is to use different operative words from those which by statute imply covenants of title. Thus, it has been held under the Missouri statute that covenants are not implied in a deed, where the grantor "bargains, sells, releases, quitclaims, and conveys."⁴

§ 860. **Who may maintain actions on covenants of a warranty.**—Like covenants of quiet enjoyment, until a breach has been committed, a covenant of warranty runs with the land into the hands of the assignees, and may be sued upon by the assignee who is in possession when the

¹ 4 Kent's Com. 473; 3 Washb. on Real Prop. 489, 490; *Gratz v. Ewalt*, 2 Binn. 95; *Funk v. Voneida*, 11 Serg. & R. 109; *Roebuck v. Dupuy*, 2 Ala. 538; *Latham v. Morgan*, 1 Smed. & M. Ch. 611; *Alexander v. Schreiber*, 10 Mo. 460; *Dickson v. Desire*, 23 Mo. 151; *Chambers v. Smith*, 23 Mo. 174; *Funk v. Cresswell*, 5 Iowa, 62; *Brown v. Tomlinson*, 2 Greene (Iowa), 527; *Prettyman v. Wilkey*, 19 Ill. 249; *King v. Gilson*, 32 Ill. 353.

² *Frontin v. Small*, 2 Ld. Raym. 419; *Merrill v. Frame*, 4 Taunt. 329; *Line v. Stevenson*, 5 Bing. N. C. 183; *Schlencker v. Moxsy*, 3 B. & C. 792; *Dennett v. Atherton*, L. R. 7 Q. B. 316.

³ See *Hawk v. McCullough*, 21 Ill. 221; *Alexander v. Schreiber*, 10 Mo. 460; *Funk v. Voneida*, 11 Serg. & R. 109; *Brown v. Tomlinson*, 2 Greene (Iowa), which seem to oppose the doctrine that the express covenant will exclude the implied covenant, while *Weems v. McCaughan*, 7 Smed. & M. 422, supports the rule.

⁴ *Gibson v. Chouteau*, 39 Mo. 566; *Valle v. Clemens*, 18 Mo. 486.

breach occurs, whether the alienation is voluntary or involuntary. After a breach there can be no assignment at common law, and it is still universally true that the covenant then ceases to run with the land.¹ But in order that a covenant may run with the land to assignees, the grantee must by the conveyance acquire the actual or constructive seisin. If at the time of the conveyance the grantor had neither title nor seisin, nothing passes by the deed, and the covenant remains in the grantee, and cannot be enforced by an assignee.² For actual adverse possession under a paramount title at the time of conveyance is itself a breach of the covenant.³ This lack of seisin does not prevent the covenant from operating as an estoppel upon the subsequently acquired title.⁴ The covenant of warranty can be and is impliedly apportioned between the assignees by a conveyance of parts or portions of the land, to which the covenant is attached, to different grantees. They each have a several and independent action upon the covenant in respect to their portion of the land.⁵ The assignee in possession at the time of the breach is generally the only person who can maintain an

¹ *Hurd v. Curtis*, 19 Pick. 459; *Slater v. Rawson*, 1 Metc. 450; *White v. Whitney*, 3 Metc. 81; *Withy v. Mumford*, 5 Cow. 137; *Ford v. Walsworth*, 19 Wend. 334; *Booth v. Starr*, 1 Conn. 244; *Chase v. Weston*, 12 N. H. 413; *Moore v. Merrill*, 17 N. H. 81; *Kellogg v. Robinson*, 6 Vt. 279; *Chaumont v. Forsythe*, 2 Pa. St. 507; *Dickinson v. Hoomes*, 8 Gratt. 353; *Lawrence v. Senter*, 4 Sneed, 52; *Redwine v. Brown*, 10 Ga. 311; *Brown v. Metz*, 33 Ill. 339; *Devin v. Hendershott*, 32 Iowa, 192.

² *Slater v. Rawson*, 1 Metc. 450; *Bartholomew v. Candee*, 14 Pick. 167; *Beddoe v. Wadsworth*, 21 Wend. 120; *Griffin v. Fairbrother*, 10 Me. 91; *Barker v. Brown*, 15 N. H. 176; *Overfield v. Christie*, 7 Serg. & R. 177; *Dickinson v. Hoomes*, 8 Gratt. 353; *Devore v. Sunderland*, 17 Ohio, 218; *Fitzhugh v. Croghan*, 2 J. J. Marsh. 429. See *Wead v. Larkin*, 54 Ill. 489; *Van Court v. Moore*, 26 Mo. 92.

³ *Moore v. Vail*, 17 Ill. 185.

⁴ *McCasker v. McEvery*, 9 R. I. 528; *Wead v. Larkin*, 54 Ill. 489; *Van Court v. Moore*, 26 Mo. 92.

⁵ 3 Washb. on Real Prop. 470; *Kane v. Sanger*, 14 Johns. 89; *Dickinson v. Hoomes*, 8 Gratt. 353.

action upon the covenant.¹ When his immediate grantor also warranted the land to him, the assignee may bring suit on either or both of the covenants, but of course can have but one recovery.² But where there are successive covenants of warranty, given by successive grantors, under certain circumstances an exception arises to the general rule just stated, that the assignee in possession is the only person who can maintain an action for the breach of the covenant. Thus, if the assignee brings suit, as he may against any one of the covenantors but the first or earliest, and recovers of him, this covenantor is remitted to his right to be indemnified by the prior covenantors, and may maintain action upon their covenants. But such covenantor can only establish his right to institute the suit by showing, that the claims of the subsequent assignees have been satisfied in full.³ And in order that the prior covenantor may be bound by the judgment against the intermediate covenantor, it is now generally recognized that the latter may vouch in his prior covenantors, and if they fail to defend the title and eviction follows, they cannot in the subsequent suit against themselves set up the defence that the eviction was not under a paramount title.⁴ The notice of the pendency of the suit,

¹ *Bickford v. Page*, 2 Mass. 455; *Wheeler v. Sohier*, 3 Cush. 219; *Kane v. Sanger*, 4 Johns. 89; *Ford v. Walsworth*, 19 Wend. 334; *Griffin v. Fairbrother*, 10 Me. 81; *Chase v. Weston*, 12 N. H. 413; *Thompson v. Sanders*, 5 B. Mon. 357.

² *Withy v. Mumford*, 5 Cow. 137; *De Chaumont v. Forsythe*, 2 Pa. St. 507; *Markland v. Crump*, 1 Dev. & B. 95; *Davis v. Judd*, 6 Wis. 85.

³ *Withy v. Mumford*, 5 Cow. 137; *Suydam v. Jones*, 10 Wend. 185; *Thompson v. Shattuck*, 2 Metc. 618; *Wheeler v. Sohier*, 3 Cush. 222; *Booth v. Starr*, 1 Conn. 244; *Markland v. Crump*, 1 Dev. & B. 94; *Redwine v. Brown*, 10 Ga. 311; *Thompson v. Sanders*, 5 B. Mon. 357.

⁴ *Chamberlain v. Preble*, 11 Allen, 373; *Boston v. Worthington*, 10 Gray, 498; *Merritt v. Morse*, 108 Mass. 276; *Andrews v. Gillespie*, 47 N. Y. 487; *Cooper v. Watson*, 10 Wend. 205; *Andrews v. Davison*, 17 N. H. 416; *Littleton v. Richardson*, 34 N. H. 187; *Turner v. Goodrich*, 26 Vt. 708; *Smith v. Sprague*, 40 Vt. 43; *Hinds v. Allen*, 34 Conn. 195; *Chapman v. Holmes*, 10 N. J. L. 20; *Paul v. Witman*, 3 Watts & S. 409; *Martin v. Cowles*, 2 Dev. & B.

in order to be effectual in binding the prior covenantors, must be certain and unequivocal. But it need not be made a matter of record. A verbal or written notice *dehors* the court, or the voluntary appearance of the prior covenantor in the suit, will be sufficient.¹

§ 861. **Damages, what may be recovered.** — If the action is on the covenant of seisin, and the covenant is satisfied by the transfer of the actual, though tortious, seisin, and broken, if at all, by the want of seisin at the time of conveyance, the measure of damages is the consideration paid, if the consideration can be ascertained, and if not, the value of the land at the time of conveyance. And in determining the consideration, parol evidence is admissible to contradict and control the statement of consideration in the deed.² If the grantor subsequently acquires the paramount title before his grantee has been evicted by the adverse holder of the title, inasmuch as the grantee acquires in certain cases the benefit of that title under the doctrine of estoppel, the grantee can then obtain only nominal damages. But full damages are recoverable, if eviction has taken place before the grantor's acquisition of the superior title.³ And so

101; *Gregg v. Richardson*, 25 Ga. 570; *King v. Kerr*, 5 Ohio, 154; *White v. Williams*, 13 Texas, 258; *St. Louis v. Bissell*, 46 Mo. 157; *Boyd v. Whitfield*, 19 Ark. 469; *McConnell v. Downs*, 48 Ill. 271; *Claycomb v. Munger*, 51 Ill. 377; *Wendell v. North*, 24 Wis. 223; *Somers v. Schmidt*, 24 Wis. 417; 1 Am. Rep. 191.

¹ *Chamberlain v. Preble*, 11 Allen, 373; *Littleton v. Richardson*, 34 N. H. 187; *Miner v. Clark*, 15 Wend. 427; *Andrews v. Gillespie*, 47 N. Y. 487; *Paul v. Witman*, 3 Watts & S. 410; *Crisfield v. Storr*, 36 Md. 129; *Somers v. Schmidt*, 24 Wis. 417; 1 Am. Rep. 191.

² *Bingham v. Weiderwax*, 1 N. Y. 514; *Morris v. Phelps*, 5 Johns. 49; *Tucker v. Clarke*, 2 Sandf. Ch. 96; *Smith v. Strong*, 14 Pick. 128; *Hodges v. Thayer*, 110 Mass. 286; *Cornell v. Jackson*, 3 Cush. 506; *Catlin v. Hurlburt*, 3 Vt. 403; *Partridge v. Hatch*, 18 N. H. 498; *Lee v. Dean*, 3 Whart. 331; *Beauplan v. McKeen*, 28 Pa. St. 124; *Farmers' Bank v. Glenn*, 68 N. C. 35; *Cox v. Strode*, 2 Bibb, 277; *Lacey v. Marnan*, 37 Ind. 168; *Kincaid v. Brittain*, 5 Sneed, 123; *Rich v. Johnson*, 2 Pinney, 88; *Dale v. Shiveley*, 8 Kan. 276.

³ *Baxter v. Bradbury*, 20 Me. 260; *Blanchard v. Ellis*, 1 Gray, 195; *King v. Gilson*, 32 Ill. 356.

also, if the covenant of seisin be construed as covenanting for an *indefeasible* seisin, and the grantor at the time of the conveyance has a tortious seisin, only nominal damages may be recovered, unless the grantee has been actually evicted, or has incurred expense in purchasing the paramount title, when in one case the consideration, and in the second case the expenses, will be the measure of damages, as in suits on the covenant against incumbrances.¹ In the action on the covenant against incumbrances the measure of damages varies with circumstances. If the covenant is merely broken by the existence of the incumbrances, and the grantee remains undisturbed in his possession, as would be the case with an outstanding mortgage, nominal damages can alone be recovered.² But if the incumbrance is of a permanent nature, as an existing easement, and the enjoyment of the land is diminished by the exercise of the easement, the measure of damages will be the loss in the value of the property, which is occasioned by the enforcement and exercise of the easement.³ If the incumbrance be an outstanding mortgage, or an attachment or execution, the purchaser need not wait for the enforcement of these liens; he may proceed at once to satisfy them, and then recover of the grantor on his covenant against incumbrances the expenses incurred in extinguishing the mortgage or removing the attachment;⁴ or if he is evicted before suit is brought on the covenant,

¹ Whiting v. Dewey, 15 Pick. 428; Catlin v. Hurlburt, 3 Vt. 403.

² Wyman v. Ballard, 12 Mass. 304; Tufts v. Adams, 8 Pick. 547; Funk v. Voneida, 11 Serg. & R. 112.

³ Haynes v. Young, 36 Me. 557; Lamb v. Danforth, 59 Me. 322; 8 Am. Rep. 426; Harlow v. Thomas, 15 Pick. 66; Batchelder v. Sturgis, 3 Cush. 201.

⁴ Delavergne v. Morris, 7 Johns. 358; Estabrook v. Smith, 6 Gray, 572; Johnson v. Collins, 115 Mass. 392; Morrison v. Underwood, 20 N. H. 369; Funk v. Voneida, 11 Serg. & R. 113; Foote v. Burnett, 10 Ohio, 317; Stambaugh v. Smith, 23 Ohio St. 584; Reasoner v. Edmundson, 5 Ind. 393; Richard v. Bent, 59 Ill. 38; 14 Am. Rep. 1; St. Louis v. Bissell, 46 Mo. 157; Eaton v. Lyman, 30 Wis. 41.

he may recover the consideration paid with interest.¹ And where damages are recovered in satisfaction of the breach of the covenant of seisin, or against incumbrances, by an actual eviction, the grantor is remitted to his title to the land, and the grantee is estopped from claiming any rights in the same under his deed.² The courts, although uniform in their decisions as to the measure of damages in actions upon the covenants of seisin and against incumbrances, are divided as to the proper rule to be applied to the covenants for quiet enjoyment and of warranty. The majority of the courts, following the principle of the ancient feudal warranty, hold that the true measure of damages is the consideration paid, and interest to date of eviction or of the judgment. Such is the rule in England, the United States courts, and in Arkansas, California, Georgia, Indiana, Iowa, Kentucky, Missouri, Maryland, Nevada, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia and Wisconsin.³ But in Connecticut, Vermont, Maine and Massachusetts the covenant is treated as one of indemnity, and the measure of damages is taken to be the value of the land at the time of eviction.⁴

§ 862. **What covenants run with the land.**—In order that a covenant may run with the land, and bind the assignees,

¹ *Chapel v. Bull*, 17 Mass. 213; *Blanchard v. Ellis*, 1 Gray, 195.

² *Porter v. Hill*, 9 Mass. 34; *Blanchard v. Ellis*, 1 Gray, 195; *Parker v. Brown*, 15 N. H. 176; *Kincaid v. Brittain*, 5 Sneed, 124.

³ *Foster v. Thompson*, 41 N. H. 379; *Lewis v. Campbell*, 8 Taunt. 715; *Mack v. Patchin*, 42 N. Y. 167; 1 Am. Rep. 506; *McGary v. Hastings*, 39 Cal. 360; *Crisfield v. Storr*, 36 Md. 150; *Wilhelm v. Fimple*, 31 Iowa, 137; *Wade v. Comstock*, 11 Ohio St. 82; *Cox v. Henry*, 32 Pa. St. 19; *Terry v. Diabensatt*, 68 Pa. St. 400; *Hopkins v. Lee*, 4 Wheat. 118; *Dalton v. Bowker*, 8 Nev. 190; *Williams v. Beekman*, 2 Dev. 483; *Davis v. Smith*, 5 Ga. 285; *Dickson v. Desire*, 23 Mo. 166; *Pence v. Duval*, 9 B. Mon. 49; *Brandt v. Foster*, 5 Iowa, 298; *Burton v. Reeds*, 20 Ind. 93.

⁴ *Lamb v. Danforth*, 59 Me. 322; 8 Am. Rep. 426; *Downer v. Smith*, 38 Vt. 464; *Horsford v. Wright*, Kirby, 3; *Bigelow v. Jones*, 4 Mass. 512; *Smith v. Strong*, 14 Pick. 128.

it must bear an intimate relation with and concern the estates or lands conveyed. It runs with the land, so as to bind the covenantor's assignees, when the performance of it is expressly or by implication made a charge upon the land.¹ On the other hand, the covenants will run with the land so as to be enforceable by the successive assignees of the land, when the performance of the covenant affects the value of the land. Thus, covenants for quiet enjoyment, and of warranty, run with the land. So also a covenant that the grantor shall not erect and maintain structures upon an adjoining lot, or erect another mill-site on some stream.² In order that a covenant may run with the land there must be a privity of estate between the covenantor and covenantee.³ And it can only be assigned with the land.⁴ Where the land consists of several parcels, or the land is divided up into parcels, and they are conveyed to different grantees,

¹ Thus, for example, covenants of rent, or for the payment of any other sum which is made a charge upon the land. *Hurst v. Rodney*, 1 Wash. 375; *Sandwith v. De Silver*, 1 Browne (Pa.) 221; *Astor v. Miller*, 2 Paige, 68; *Van Rensselaer v. Dennison*, 35 N. Y. 393; *Worthington v. Hewes*, 19 Ohio St. 66; *Goudy v. Goudy*, *Wright* (Ohio), 410; *Thomas v. Von Kapff*, 6 Gill & J. 372; *Wooliscroft v. Norton*, 15 Wis. 198. See *ante*, sect. 190. Covenants, not to use the land, or only to use it, in the specified manner. *Barron v. Richards*, 3 Edw. Ch. 96; *s. c.*, 8 Paige, 351; *St. Andrews Church Appeal*, 67 Pa. St. 512; *Winfield v. Henning*, 21 N. J. L. 188; *Jeter v. Glenn*, 9 Rich. L. 374; *Thomas v. Poole*, 7 Gray, 83. See *ante*, sect. 603. A covenant to maintain fences, or to permit the enjoyment of any other easement. *Bronson v. Coffin*, 108 Mass. 175; *Duffy v. N. Y.*, etc., R. R., 2 Hill, 496; *Brewer v. Marshall*, 18 N. J. Eq. 337; *Nordfleet v. Cromwell*, 64 N. C. 1; *Walsh v. Barton*, 24 Ohio St. 28; *Easter v. Little Miami R. R.*, 14 Ohio St. 48; *Dorsey v. St. Louis*, etc., R. R., 58 Ill. 65. But an executory covenant to erect a party-wall will not run with the land, so as to bind the assignees of the covenantor. *Cole v. Hughes*, 54 N. Y. 444; 13 Am. Rep. 611.

² *Trustees of Watertown v. Cowen*, 4 Paige, 510; *Norman v. Wells*, 17 Wend. 136; *Dailey v. Beck*, *Bright*, 107; *Brew v. Van Denman*, 6 Heisk. 433.

³ *Morse v. Aldrich*, 19 Pick. 449; *Cole v. Hughes*, 54 N. Y. 444; 13 Am. Rep. 611; *Kirkpatrick v. Peshine*, 24 N. J. Eq. 206.

⁴ *Wilson v. Wiedenham*, 51 Me. 566; *Randolph v. Kinney*, 3 Rand. 394; *Nesbit v. Brown*, 1 Dev. Eq., 30; *Martin v. Gordon*, 24 Ga. 533.

the covenant is divided up among them, and each may sue or be sued on his portion of the covenant.¹

§ 863. **When breach of covenant works a forfeiture of estate.**—The breach of a covenant running with the land will not of itself work a forfeiture of the estate, to which it is annexed. The breach only gives rise to a personal action for damages on the covenant, or an equitable action for its enforcement. But it may by express limitation be made to operate as a condition as well as a covenant. In such a case, the breach of the covenant is the breach of a condition subsequent, and the grantor may re-enter. Where the forms of expression usual in the creation of a condition, such as “on condition,” “provided always,” and the like, are employed, nothing further is needed to give the covenant the character and force of a condition. But generally, if other words are used, it is necessary that the covenant should contain a clause of forfeiture, or the reservation of a right of entry upon the breach of the covenant, in order that the breach may work a forfeiture of the estate.²

¹ *Astor v. Miller*, 2 Paige, 68; *Johnson v. Blydenburg*, 31 N. Y. 427.

² *Rawson v. Uxbridge*, 7 Allen, 125; *Chapin v. Harris*, 8 Allen, 594; *Ayer v. Emery*, 14 Allen, 69; *Packard v. Ames*, 10 Gray, 325; *Moore v. Pitts*, 53 N. Y. 85; *Walters v. Breden*, 70 Pa. St. 235; *Supervisors, etc., v. Patterson*, 56 Ill. 119; *Board, etc., v. Trustees, etc.*, 63 Ill. 204; *Warren v. Meyer*, 22 Iowa, 551. See *Parsons v. Miller*, 18 Wend. 564; *Emerson v. Simpson*, 43 N. H. 475; *Sharon Iron Co. v. Erie*, 41 Pa. St. 341; *Gadberry v. Sheppard*, 27 Miss. 203. See also *ante*, sect. 272, n.

CHAPTER XXIII.

TITLE BY DEVISE.

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§ 872. **Definition and historical outline.** — A title by devise is that title to lands which is created by will. The term “devise” is properly applicable only to real estate. The transfer by will of personal property, or of chattel interests in real property, is called a bequest. A will is an instrument of conveyance, by which the testator undertakes to direct the disposition of his property after his death. It has always been possible at common law to make a testamentary disposition of personal property. Under the Saxon laws lands were devisable as freely as they were alienable; but upon the Conquest of England by the Normans, the

same policy which dictated the deprivation of the right of alienation called for the abolition of the right to dispose of lands by will. Accordingly, lands could not, after the Norman Conquest, be devised. But upon the introduction of the doctrine of uses means were discovered, whereby such a disposition could be made. It will be remembered that, in formulating the law of uses, courts of equity only adopted those rules governing legal estates which were conformable to the policy of the court in respect to uses. Hence they declared that uses were devisable, although the legal estates which supported them were not. When the Statute of Uses was passed the use became united to the legal estate, and this mode of devising lands was taken away. But in connection with uses there had been developed the doctrine of powers, whereby one could convey lands to the use of whomsoever the grantor should appoint by will. The appointee would take, not by force of the will, but under the deed of conveyance.¹ And after the passage of the Statute of Uses, as soon as he was appointed by the will of the grantor, the use thereby created and vesting in him was immediately executed by the statute, and he acquired the legal estate as effectually as if the lands could have been devised directly to him. Mr. Washburn states that the effect of the Statute of Uses "was to destroy the power of devising lands by the way of uses; and they accordingly became undevisable, and remained so until the Statute of Wills."² This is true so far as the power to devise a vested use is concerned. But a power of appointment by will was not affected by the statute. The use created by the exercise of the power is contingent until the power is exercised, and hence the statute could not operate upon it, so as to destroy the power to make a devise in this way. At any rate, such a disposition could be made before the Statute of Uses, and it has universally been recognized as an effective mode of disposition

¹ See *ante*, sect. 559.

² 3 Washb. on Real Prop. 501, 502.

since the Statute of Wills, and independent of the latter statute. Furthermore, no reason has been, or can be, assigned why it was not just as effective between the enactments of the Statute of Uses and the Statute of Wills, which was enacted in the 32 and 34 Hen. VIII., which expressly enabled the proprietors of lands to dispose of their legal estates, without resorting to the indirect mode of creating a power of appointment. The effect of this Statute of Wills, and of similar ones passed in the different States of the American Union, constitutes the subject of this chapter.

§ 873. **By what law are devises governed.**—Like all other legal questions arising in respect to the rights in, or issuing out of, lands, the legality and effect of devises are governed by the law of the place where the land is situated, the *lex loci rei sitæ*. In determining, therefore, the validity of a will of real property, the place where the will happens to be made is of no importance. The provisions of the *lex loci rei* alone govern.¹ But in respect to the *interpretation* of a will, since the object of all efforts at interpretation is to ascertain the intention of the testator, it seems to be the established rule that the law of the domicile in force at the making of the will will govern, unless the testator appears to have had the provisions of the *lex loci* in mind.² The *lex loci rei sitæ* governs chattel interests in lands as well as in

¹ Story Conf. Laws, sect. 474; 4 Kent's Com. 513; 1 Redf. on Wills, 387; Kerr v. Moon, 9 Wheat. 565; U. S. v. Crosby, 7 Cranch, 115; Potter v. Titcomb, 22 Me. 300; Moultrie v. Hunt, 23 N. Y. 394; Bascom v. Albertson, 34 N. Y. 584; Cutter v. Davenport, 1 Pick. 81; Morrison v. Campbell, 2 Rand. 209; Holman v. Hopkins, 27 Texas, 38; Swearingen v. Morris, 14 Ohio St. 424; Johnson v. Copeland, 35 Ala. 521; Varner v. Bevil, 17 Ala. 286; Williams v. Saunders, 5 Coldw. 60; Applegate v. Smith, 31 Mo. 166; Richards v. Miller, 62 Ill. 417; Cornelison v. Browning, 10 B. Mon. 425; Thieband v. Sebastian, 10 Ind. 454; Morris v. Harris, 15 Cal. 226.

² 2 Greenl. on Ev., sect. 671; Story on Conf., sect. 479 h.

real estate. Leasholds are, therefore, governed by that law.¹

§ 874. **The requisites of a valid will.** — The following may be mentioned as the principal requisites of a will: A sufficient writing, proper attestation, subject-matter, a competent testator, a competent devisee.

§ 875. **A sufficient writing.** — The statute 32 Hen. VIII. empowers the holders of lands to dispose of them by their last will and testament *in writing*. No particular form of instrument is prescribed, and none is required, provided the words and forms of expression used sufficiently indicate the intention to make a will, and describe clearly the property upon which the will is to operate and the person to whom it shall go. Indeed, an instrument in the form of a deed has been held to operate as a will.² The same instrument may be held to be partly a deed and in other respects a will.³ The presumption, however, is against an instrument, in form a deed, operating as a will. Where it appears to have been the intention that the instrument shall operate as a deed, it cannot take effect as a will, although it may be absolutely void as a deed. And it is incumbent upon the party claiming under the instrument to show that it was executed *animo*

¹ *Thompson v. Adv.-Gen.*, 12 Cl. & Fin. (H. L. Cas. 1); *Freke v. Carberry*, L. R. 16 Eq. 461.

² *Manly v. Lakin*, 1 Hagg. 130; *Henderson v. Farbridge*, 1 Russ. 479; *Gage v. Gage*, 12 N. H. 371; *Turner v. Scott*, 51 Pa. St. 126; *Frederick's Appeal*, 52 Pa. St. 338; *Stewart v. Stewart*, 5 Conn. 317; *Corey v. Dennis*, 13 Md. 1; *Wagner v. McDonald*, 2 Harr. & J. 346; *Ingram v. Porter*, 4 McCord, 198; *Wheeler v. Durant*, 3 Rich. Eq. 452; *Symmes v. Arnold*, 10 Ga. 506; *Hall v. Bragg*, 28 Ga. 330; *Gillham v. Mustin*, 42 Ala. 365; *Harrington v. Bradford*, 1 Miss. 520; *Wall v. Wall*, 30 Miss. 91; *Allison v. Allison*, 4 Hawks, 141; *Stevenson v. Huddleston*, 13 B. Mon. 299; *Millican v. Millican*, 24 Texas, 426; *Burlington University v. Barrett*, 22 Iowa, 60.

³ *Jacks v. Henderson*, 1 Desau. 543; *Robinson v. Schley*, 6 Ga. 515; *Watkins v. Dean*, 10 Yerg. 321; *Taylor v. Kelly*, 31 Ala. 59.

testandi.¹ The intention may be ascertained either, when it is expressed on the face of the instrument, from the undertaking to dispose of property after death, in such a manner that the instrument cannot take effect as a deed, or by parol evidence, where there is no expression of intent, and it is doubtful on the face of the instrument in what manner the donor intended the instrument to operate. The admissibility of parol evidence may be a disputed point; and, certainly where it is possible, the intention must be gathered from the contents of the whole instrument.² It is not necessary that the will or any part of it should be actually *written*. Printing, engraving and lithographing are held to be equivalent to writing, and to satisfy the requirement of the Statute of Frauds.³ It is, likewise, not necessary that the will be written in ink. A valid will may be written in pencil.⁴ But where the will is written partly in ink, partly in pencil, and partly printed, and the writing in ink made sense with the printed matter, and appeared to be a complete will without the aid of the pencil writing, it was held that the writing in pencil constituted no part of the will.⁵

¹ Combs v. Jolly, 3 N. J. Eq. 625; Collins v. Townley, 21 N. J. Eq. 353; Rohrer v. Stehman, 1 Watts, 442; Todd's Will, 2 Watts & S. 145; Frew v. Clark, 80 Pa. St. 170; Fort v. Fort, 3 Dev. L. 19; Duke v. Dyches, 2 Strobb. Eq. 353; Brunson v. King, 2 Hill (S. C.) Ch. 483; Symmes v. Arnold, 10 Ga. 506; Anderson v. Pryor, 18 Miss. 620; Edwards v. Smith, 15 Miss. 197; Golding v. Golding's Adm'r, 24 Ala. 122; Allison v. Allison, 4 Hawks, 141; Phipps v. Hope, 16 Ohio St. 586.

² See McGee v. McCants, 1 McCord, 517; Tappan v. Diblois, 45 Me. 122; Hall v. Chaffee, 14 N. H. 215; Hawley v. Northampton, 8 Mass. 3; Wright v. Barrett, 13 Pick. 41; Lythe v. Beveridge, 58 N. Y. 592; Stokes v. Tilly, 9 N. J. Eq. 130; Provost v. Provost, 27 N. J. Eq. 296; Asoy v. Hoover, 5 Pa. St. 21; Barker's Appeal, 72 Pa. St. 420; Bowly v. Lamont, 3 Harr. & J. 4; Parker v. Wasley, 9 Gratt. 477; Gillis v. Harris, 6 Jones Eq. 267; Cook v. Weaver, 12 Ga. 47; Sorsby v. Vance, 36 Miss. 564; Jackson v. Hoover, 26 Ind. 511; Johnson v. M. E. Church, 4 Iowa, 180.

³ Henshaw v. Foster, 9 Pick. 312; Temple v. Mead, 4 Vt. 535.

⁴ Kell v. Charmer, 23 Beav. 195; Lucas v. James, 7 Hare, 419; Myers v. Vanderbilt, 84 Pa. St. 510; Philbrick v. Spangler, 15 La. An. 46.

⁵ In re Adams, L. R. 2 P. & D. 367.

§ 876. **What signing is necessary.** — The English Statute of Wills only required that the will should be in writing, and did not make it necessary for the testator to sign or to seal the instrument. And, although it may be customary in some localities to seal a will, it has never been considered a requisite to the validity of the will, and is not necessary, except in Vermont and New Hampshire.¹ But the Statute of Frauds of 29 Chas. II., and the American Statutes of Wills generally, provide that the will shall be *signed* or *subscribed* by the testator. If the statute requires it to be *signed*, the signature of the testator in any part of the instrument will be a sufficient signing. But if the statute requires it to be *subscribed*, the testator must sign his name at the bottom or end of the will. If the testator is unable to write he may make his mark, and this mark alone will be a proper signing of the will, although it is customary for some one, usually an attesting witness, to write his name around or about the mark.² In Missouri, if the name is written by some one, it must be by an attesting witness, and the attestation clause must contain a statement that the testator's name was signed at his request.³ In the same manner some one may guide his hand in writing his name or making his mark, when he is too weak from disease to write without assistance, and he requests such assistance.⁴ The courts go

¹ 3 Washb. on Real Prop. 507. See *Avery v. Pixley*, 4 Mass. 469; *Piatt v. McCullough*, 1 McLean, 69; *Williams v. Burnett*, Wright, 53; *Padfield v. Padfield*, 72 Ill. 322.

² *Taylor v. Dening*, 3 Nev. & P. 228; *s. c., nom. Baker v. Dening*, 8 Ad. Ell. 94; *Stevens v. Van Cleve*, 4 Wash. C. Ct. 262; *Van Hanswyck v. Wiese*, 44 Barb. 494; *Jackson v. Jackson*, 39 N. Y. 153; *Main v. Ryder*, 84 Pa. St. 217; *St. Louis Hospital v. Williams*, 19 Mo. 609.

³ *McGee v. Porter*, 14 Mo. 611; *St. Louis Hospital v. Williams*, 19 Mo. 609; *Northcutt v. Northcutt*, 20 Mo. 266.

⁴ *Wilson v. Beddard*, 12 Sim. 28; *Sprague v. Luther*, 8 R. I. 252; *Nickerson v. Buck*, 12 Cush. 332; *Jackson v. Van Duysen*, 5 Johns. 144; *Chaffee v. Baptist M. C.*, 10 Paige Ch. 85; *Flannery's Will*, 24 Pa. St. 502; *Cozzen's Will*, 61 Pa. St. 196; *Higgins v. Carlton*, 28 Md. 115; *Smith v. Dolby*, 4 Harr. 350; *Ray v. Hill*, 3 Strobb. 297; *Upchurch v. Upchurch*, 16 B. Mon. 102.

still further and hold that where the testator, through his feebleness, is unable to handle the pen, he may request another to sign his name for him, and such signature will be a good signing of the will, without any mark by the testator.¹

§ 877. **Proper attestation, what is.** — The English Statute of Frauds required the execution of the will to be attested and subscribed by three or four competent and credible witnesses. This general provision is adopted in all the States, but the number of witnesses required varies. In Connecticut, District of Columbia, Florida, Georgia, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Mexico, South Carolina, Vermont, three witnesses are required; while two are sufficient in Alabama, Arkansas, California, Colorado, Dakota, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New York, North Carolina, Ohio, Oregon, Rhode Island, Tennessee, Utah, Virginia, West Virginia, and Wisconsin. Witnesses to a will are required to do more than witnesses to a deed. The latter are only called upon to witness the execution of the deed. But witnesses to a will are made judges of the competency of the testator, and in any subsequent litigation over the will, involving the question of the capacity of the testator, they are in effect *expert* witnesses, and can give their opinion of the testator's mental capacity.³

¹ *Asay v. Hoover*, 5 Pa. St. 21; *Main v. Ryder*, 84 Pa. St. 217; *Robins v. Coryell*, 27 Barb. 550; *Vernon v. Kirk*, 30 Pa. St. 218; *Rosser v. Franklin*, 6 Gratt. 1; *Armstrong v. Armstrong*, 29 Ala. 538; *Will of Cornelius*, 14 Ark. 675; *Abraham v. Wilkins*, 17 Ark. 292; *McGee v. Porter*, 14 Mo. 611; *Simpson v. Simpson*, 27 Mo. 288; *Will of Jenkins*, 43 Wis. 610; *Pool v. Buffum*, 3 Oreg. 438.

² 1 Jarm. Wills (5th Am. ed.), 198 Am. note.

³ 1 Greenl. on Ev., sect. 440; *Field's Appeal*, 36 Conn. 277; *Whitenack v. Stryker*, 2 N. J. Eq. 9; *Heyward v. Hazard*, 1 Bay, 335; *Withinton v. Withinton*, 7 Mo. 589.

It is, therefore, generally held that the testator must *publish* his will, *i.e.*, declare to the witnesses that the instrument before them is his last will and testament, and without some such declaration the will will be void.¹ To make a valid publication, the will must at the time be complete in all its parts.² Although the testator need not sign in the presence of the witnesses,³ they must sign in his presence.⁴ What is a sufficient "presence" is governed largely by the circumstances. In determining this question, there are only two elements to be considered: *First*, were the witnesses at the time of signing so situated that the testator could see them; and *secondly*, was he in a conscious state. It is not necessary that the testator should actually see the signing,

¹ See *Cilley v. Cilley*, 34 Me. 162; *Ela v. Edwards*, 16 Gray, 91; *Swett v. Boardman*, 1 Mass. 258; *Brinckerhoff v. Remsen*, 26 Wend. 325; *Rutherford v. Rutherford*, 1 Denio, 33; *Gilbert v. Knox*, 52 N. Y. 125; *Transue v. Brown*, 31 Pa. St. 92; *Compton v. Mitton*, 12 N. J. L. 70; *Combs v. Jolly*, 3 N. J. Eq. 625; *Sutton v. Sutton*, 5 Harr. 459; *Beane v. Yerby*, 12 Gratt. 239; *Verdier v. Verdier*, 8 Rich. 135; *Upchurch v. Upchurch*, 16 B. Mon. 102; *Raudebaugh v. Shelley*, 6 Ohio St. 307; *Brown v. McAllister*, 34 Ind. 375; *Dickie v. Carter*, 42 Ill. 376; *Cravens v. Falconer*, 28 Mo. 19; *Rogers v. Diamond*, 13 Ark. 474; *Buntin v. Johnson*, 28 La. An. 796. In Georgia and Pennsylvania there seems to be no necessity of a publication. *Webb v. Fleming*, 30 Ga. 808; *Loy v. Kennedy*, 1 Watts & S. 396. But see *Transue v. Brown*, *supra*.

² *Barnes v. Syester*, 14 Md. 507; *Waller v. Waller*, 1 Gratt. 454; *Jones v. Jones*, 3 Metc. (Ky.) 266; *Chisholm's Heirs v. Ben*, 7 B. Mon. 408.

³ Provided he acknowledges his signature and requests them to attest it. *Smith v. Codron*, 2 Ves. 455; *Tilden v. Tilden*, 13 Gray, 103; *Mickerson v. Buck*, 12 Cush. 332; *Adams v. Field*, 21 Vt. 256; *Tarrant v. Ware*, 25 N. Y. 425; *Baskin v. Baskin*, 36 N. Y. 416; *Compton v. Mitton*, 12 N. J. L. 70; *Will of Alspaugh*, 23 N. J. Eq. 507; *Loy v. Kennedy*, 1 Watts & S. 396; *Higgins v. Carlton*, 28 Md. 115; *Rosser v. Franklin*, 6 Gratt. 1; *Tucker v. Oxner*, 12 Rich. L. 141; *Thompson v. Davitte*, 59 Ga. 472; *Turner v. Cook*, 36 Ind. 129; *Upchurch v. Upchurch*, 16 B. Mon. 102; *Allison v. Allison*, 46 Ill. 61; *Abraham v. Wilkins*, 17 Ark. 292.

⁴ *Roberts v. Welch*, 46 Vt. 164; *Tappan v. Davidson*, 27 N. J. Eq. 459; *Lucas v. Parsons*, 24 Ga. 640; *Parramore v. Taylor*, 11 Gratt. 220; *Watson v. Hipes*, 32 Miss. 451; *Hill v. Barge*, 12 Ala. 687; *Cravens v. Falconer*, 28 Mo. 19. *Contra*, *Lyon v. Smith*, 11 Barb. 124; *Carroll v. Norton*, 3 Bradf. 291; *Abraham v. Wilkins*, 17 Ark. 292.

if he was in a position to see it if he wanted to.¹ Not only is this true, but if the testator is blind, the will will be properly attested if the witnesses when signing were in such a position, that the testator could have seen them if he had had his sight.² And it is not even necessary that the testator should be in the same room with the witnesses. Attestation in a different room, although presumptively bad, will be good if the testator could see the performance of the act of attestation.³ And in some of the States it is also required that the witnesses shall sign in the presence of each other.⁴ But the general rule is that they may sign at different times, and not in the presence of each other, provided they all sign in the presence of the testator.⁵ It is usual for the will to contain an attestation clause, containing a declaration of all the acts done in compliance with the statute, and which are necessary to the valid execution of a will. No particular form, expression or words are necessary to constitute an attestation, and even if the attestation clause is omitted altogether the will will be good, for the meaning of the wit-

¹ *Boldry v. Parris*, 2 Cush. 433; *Edelen v. Hardy*, 7 Harr & J. 1; *Nock v. Nock*, 10 Gratt. 106; *Bynum v. Bynum*, 11 Ired. L. 632; *Reynolds v. Reynolds*, 1 Speers, 253; *Wright v. Lewis*, 5 Rich. 212; *Lamb v. Girtman*, 33 Ga. 289; *Hill v. Barge*, 12 Ala. 687; *Rucker v. Lambdin*, 12 Smed. & M. 230; *Watson v. Pipes*, 32 Miss. 451; *Howard's Will*, 5 B. Mon. 199; *Ambree v. Weishaar*, 74 Ill. 109.

² *In re Piercy*, 1 Robt. 278; *Lewis v. Lewis*, 6 Serg. & R. 489; *Weir v. Fitzgerald*, 2 Bradf. 42; *Wampler v. Wampler*, 9 Md. 540; *Reynolds v. Reynolds*, 1 Speers, 253.

³ *Newton v. Clarke*, 2 Curt. 320; *Lamb v. Girtman*, 33 Ga. 289. See also *Sprague v. Luther*, 8 R. I. 252; *Neil v. Neil*, 1 Leigh, 6; *Russell v. Falls*, 3 Harr. & McH. 457; *Brooks v. Duffell*, 23 Ga. 441; *Graham v. Graham*, 10 Ired. L. 219; *Watson v. Pipes*, 32 Miss. 451; *Howard's Will*, 5 B. Mon. 199; *Ambree v. Weishaar*, 74 Ill. 109. In one case attestation in a different house was held to be sufficient, the testator being in a position to see the act. *Casson v. Dode*, 1 Bro. C. C. 99.

⁴ *Blanchard v. Blanchard*, 32 Vt. 62.

⁵ *Gaylor's Appeal*, 43 Conn. 82; *Cravens v. Falconer*, 28 Mo. 19; *Flinn v. Owen*, 58 Ill. 111; *Hoffman v. Hoffman*, 26 Ala. 535.

nesses' signatures may be established by parol evidence.¹ But it is always advisable to insert a full and complete attestation clause, for the declarations in the clause as to the proper execution of the will raise a presumption that the will was properly executed, and throws the burden of proof to the contrary upon the party contesting the will.² Generally the witnesses must sign below the attestation clause at the end of the will, and in New York and Kentucky this is required by statute.³ But the common law does not require the witnesses to sign in any particular place.⁴ If the will has not been properly attested it is, of course, inoperative. But where a codicil is subsequently executed, properly attested, confirming the prior defective will expressly or by implication, it will cure the defect, and make the will operative from the date of the codicil.⁵

§ 878. **Who are competent witnesses.**—Some of the State statutes require the witnesses to be *credible*, and the others that they shall be *competent*. But the two words in this connection are used synonymously, and the same general rules govern in all the States. The meaning of this requirement is that the witnesses must be so circumstanced, that their testimony in a court of justice will be competent to establish the validity of the will. The three principal

¹ *Hands v. James*, Comyn, 531; *Brice v. Smith*, Willes, 1; *Hitch v. Wells*, 10 Beav. 84; *Fry's Will*, 2 R. L. 88; *Cla v. Edwards*, 16 Gray, 91; *Chaffee v. Baptist M. C.*, 10 Paige, 85; *Leaycraft v. Simmons*, 3 Bradf. 35; *Lucas v. Parsons*, 24 Ga. 640. See *contra*, *Griffith v. Griffith*, 5 B. Mon. 511. And see, generally, *Osborn v. Cook*, 11 Cush. 532; *Jackson v. Jackson*, 39 N. Y. 153; *Fatheree v. Lawrence*, 33 Miss. 585.

² *Tappen v. Davidson*, 27 N. J. Eq. 459.

³ *Coffin v. Coffin*, 23 N. Y. 9; *Peck v. Cary*, 27 N. Y. 9.

⁴ *In re Chamney*, 1 Robt. 757; *Roberts v. Phillips*, 4 Ell. & Bl. 450; *Murray v. Murphy*, 39 Miss. 214.

⁵ *Anderson v. Anderson*, L. R. 13 Eq. 381; *Mooers v. White*, 6 Johns. Ch. 360; *Van Cortlandt v. Kip*, 1 Hill, 590; *Wikoff's Appeal*, 15 Pa. St. 281; *Harvey v. Chouteau*, 14 Mo. 587.

causes of incompetency are mental imbecility, arising either from insanity or tender age, the commission of crime, and the possession of an interest in the operation of the will. The first two causes are governed by the general rules of evidence, and are explained in all treatises upon the law of evidence, and will need no special elucidation here. The most common cause of incompetency in respect to wills is that of interest. The common-law rule is that if a witness to the will is interested in it as a legatee or devisee, the will is void. But now in most of the States it is provided by statute that in such cases the will be good, but the devise or legacy to the witness will be void. In some of the States the devise is declared absolutely void,¹ but generally the devise is void, only when there is not a sufficient number of witnesses without the disqualified witness.² In others of the States there is this further qualification, that where the devisee receives no more by the will than he would have been entitled to as heir, if the testator had died intestate, he is a competent witness. This rule is either laid down by statute, or is a consequence of the rule that where a devisee is heir at law of the testator, and is not benefited by the will, he takes as heir and not as devisee.³ It is held in some of the States that a witness, incompetent on account of interest, may become competent by making an assignment or

¹ Such is the law in Rhode Island, New York, New Jersey, North Carolina, South Carolina, Georgia, Indiana, Ohio and Oregon. 1 Jar. on Wills (5th Am. ed.), 189 Am. note.

² This is the rule in Massachusetts, Michigan, Missouri, Minnesota, New Hampshire, Nebraska, Virginia, Vermont, Wisconsin, Kentucky, Kansas, Iowa, Illinois, Dakota, Connecticut, Colorado, California, West Virginia and Arkansas. 1 Jar. on Wills (5th Am. ed.), 189, Am. note. In New York the same rule has been adopted by the courts. *Cromwell v. Woolly*, 1 Abb. Pr. 442.

³ *Jackson v. Denniston*, 4 Johns. 311; *Starr v. Starr*, 2 Root, 363; *Fortune v. Buck*, 23 Conn. 1; *Ackless v. Seekright*, Breese, 76; *Croft v. Croft*, 4 Gratt. 103; *Moore v. McWilliams*, 3 Rich. Eq. 10; *Cannon v. Setzler*, 6 Rich. 471; *Rucker v. Lambdin*, 12 Smed. & M. 230; *Graham v. O'Fallon*, 4 Mo. 601.

release of his interest.¹ Not only is the witness incompetent where he is himself a devisee, but he or she is likewise incompetent where his wife or her husband, respectively, is a devisee.² But, although a different rule is observed in some of the States,³ it is generally held that an executor or trustee is not thereby incapacitated from acting as a witness to the will which appoints him.⁴ If the witness is competent at the time of the attestation, it will not invalidate the attestation if he subsequently becomes incompetent from any cause. He is only required to be competent when he attests the will.⁵

§ 879. **Who may prepare the will — Holographs.** — As a general proposition, there is no restriction as to the person who may prepare and write the will, the testator or some other person at his request. When the will is in the testator's own handwriting it is called a *holograph*, and in Arkansas, Kentucky, Tennessee, Virginia, North Carolina, Mississippi and Louisiana it is provided by statute that no

¹ *Kern v. Soxman*, 16 Serg. & R. 315; *Hans v. Palmer*, 21 Pa. St. 296; *Deakins v. Hollis*, 7 Gill & J. 311; *Shaffer v. Corbett*, 3 Harr. & McH. 513; *Mixon v. Armstrong*, 38 Texas, 296. *Contra*, *Allison v. Allison*, 4 Hawks, 141.

² *Winslow v. Kimball*, 25 Me. 493; *Sullivan v. Sullivan*, 106 Mass. 474; *Jackson v. Woods*, 1 Johns. 163; *Huie v. Gunter*, 3 Jones L. 441; *Brayfield v. Brayfield*, 3 Harr. & J. 203.

³ *Gilbert v. Gilbert*, 23 Ala. 529; *Davis v. Rogers*, 1 Houst. 44. But see *Hawley v. Brown*, 1 Root. 494; *Vansant v. Boileau*, 1 Binn. 444; *Gunter v. Gunter*, 3 Jones L. 441; *Filson v. Filson*, 3 Strobb. 288.

⁴ *Millay v. Wiley*, 46 Me. 230; *Wyman v. Symmes*, 10 Allen, 153; *Richardson v. Richardson*, 35 Vt. 238; *Stewart v. Harriman*, 56 N. H. 25; *Comstock v. Hadlyme*, 8 Conn. 254; *McDonough v. Loughlin*, 20 Barb. 238; *Frew v. Clarke*, 80 Pa. St. 170; *Dorsey v. Warfield*, 7 Md. 65; *Overton v. Overton*, 4 Dev. & B. 197; *Noble v. Burnett*, 10 Rich. 505; *Meyer v. Fogg*, 7 Fla. 292; *Kelly v. Miller*, 39 Miss. 17; *Orndoff v. Hummer*, 12 B. Mon. 619; *Murphy v. Murphy*, 24 Mo. 526; *Peralta v. Castro*, 6 Cal. 354.

⁵ *Patten v. Tallman*, 27 Me. 17; *Amory v. Fellowes*, 5 Mass. 219; *Sears v. Dillingham*, 12 Mass. 358; *McLean v. Barnard*, 1 Root, 462; *Higgins v. Carlton*, 28 Md. 115; *Deakins v. Hollis*, 7 Gill & J. 311; *Gill's Will*, 2 Dana, 447; *Rucker v. Lambdin*, 12 Smed. & M. 230; *Mixon v. Armstrong*, 38 Texas, 296.

witnesses are required to attest such wills.¹ A will drawn up by the devisee will, nevertheless, be good. But a suspicion is cast upon the validity of the will, and it requires stronger evidence in such cases to rebut the charge of undue influence. If the testator is of feeble mind at the time, and is notoriously under the influence of this devisee, the will would in ordinary cases be overthrown, unless the strongest proof of fair dealing was established in support of the will.²

§ 880. **What property may be devised.** — It may be stated as a general proposition that every interest in lands except a mere possibility may be the subject of devise. This would include incorporeal as well as corporeal hereditaments, estates in expectancy, contingent remainders, where the contingency does not rest upon the uncertainty of the remainder-man, and possibilities coupled with an interest, such as a right of entry to defeat an estate upon condition, where it is attached to some reversionary interest.³ In Massachusetts a right of entry in an estate upon condition may be devised, whether the grantor has a reversionary interest or not. And the right will sometimes pass to the devisee under a residuary devise without special mention.⁴ It was once the English law, and at an early day the law in

¹ 1 Jar. on Wills (5th Am. ed.), 200, Am. note. See *Harrison v. Burgess*, 1 Hawks, 384; *Brown v. Beaver*, 3 Jones L. 516; *Succession of Ehrenberg*, 21 La. An. 280; *Hannah v. Peake*, 2 B. Mon. 133; *Hocker v. Hocker*, 4 Gratt. 277; *Crutcher v. Crutcher*, 11 Humph. 377; *Anderson v. Pryor*, 10 Smed. & M. 620.

² *Barr v. Buttin*, 1 Curt. 637; *Ingraham v. Wyatt*, 1 Hagg. 388; *Delafield v. Parrish*, 25 N. Y. 9; *Taylor v. Gardiner*, 35 N. Y. 559; *Day v. Day*, 3 N. J. Eq. 549; *Cramer v. Crumbaugh*, 3 Md. 491; *Beall v. Mann*, 5 Ga. 456; *Harvey v. Sullens*, 46 Mo. 147.

³ 2 Washb. on Real Prop. 562; 3 Washb. on Real Prop. 522, 523; 4 Kent's Com. 511, 513; *Hayden v. Stoughton*, 5 Pick. 528; *Brigham v. Shattuck*, 10 Pick. 306; *Austin v. Cambridgeport Parish*, 21 Pick. 215; *Steel v. Cook*, 1 Metc. 281; *Den v. Manners*, 20 N. J. L. 142; *Southard v. Central R. R. Co.*, 26 N. J. L. 13; *Kean v. Roe*, 2 Harr. 112.

⁴ *Hayden v. Stoughton*, 5 Pick. 528; *Austin v. Cambridgeport Parish*, 21 Pick. 215.

this country, that the will could only convey the real property owned by the testator at the time when the will was executed. But now in England and in most of the States this rule has been changed by statute, so that a residuary or general devise will convey whatever property the testator owned at the time of his death.¹

§ 881. **A competent testator, who is.** — All persons are competent to dispose of their property by will, who do not come under one of the three classes of persons under disability. The three classes are infants, *femes covert*, and persons of insane mind. These persons are expressly excluded by the old English Statute of Wills, and they are either expressly excluded by the American statutes, or by implication, unless the statutes expressly direct otherwise. The general rule in regard to infants is that they cannot make a devise of real property until they are twenty-one years of age. But, in some of the States, females of the age of eighteen are by statute declared to be competent to make a will.² Although, under the English Statute of Wills and the earlier American statutes, a married woman was not allowed to make a will of her property, yet her property could be settled to her use and to the use of her appointee by will. Her appointee would take the legal estate by the operation of the Statute of Uses upon her appointment. In England, and in all the States, she could make a will of equitable estates if the power was expressly reserved to her, and in some of the States, as well as in England, it was not

¹ 3 Washb. on Real Prop. 509. This is the statute law in Alabama, California, Colorado, Connecticut, Delaware, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New Hampshire, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, West Virginia and Wisconsin. 1 Jar. on Wills (5th Am. ed.), 602, 603, Am. note.

² 3 Washb. on Real Prop. 510.

necessary to reserve the power. She possessed it as a natural incident of her separate estate.¹ In the United States the later tendency of legislation is to free married women from all disability in respect to the management of her property. In some States there is the broad rule of law established, that a married woman shall have in respect to her property all the powers of disposition and management as a single woman. Of course, in those States she can make a will of her legal as well as her equitable estates, and bar whatever contingent interests her husband may have in her property, including his tenancy by the curtesy.² But in some of those States where she has not an absolute estate in her real property she cannot make a will which will bar her husband's curtesy, but in every other way her will will convey a good title to the devisee.³ In respect to what degree of sanity is necessary to make a competent testator, it is difficult to make any concise and comprehensive statement which will apply to every case which may arise; and a detailed presentation of the law would require more space than could be given to the subject in an elementary treatise on real property. The inquiry in all such cases is: Had the testator at the time of the execution of the will sufficient mental capacity to make a will, not whether he was sane or insane.⁴ "He must, undoubtedly, retain sufficient *active* memory to collect in his mind, without prompting, particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their more obvious relations to each

¹ See *ante*, sect. 469, note.

² 3 Washb. on Real Prop. 510. See *Van Wert v. Benedict*, 1 Bradf. 114; *Dickinson v. Dickinson*, 61 Pa. St. 401; *Johnson v. Sharp*, 4 Coldw. 45; *Mosser v. Mosser's Ex'ors*, 32 Ala. 551; *Allen v. Little*, 5 Ohio, 65; *In re Fuller*, 79 Ill. 99.

³ *Silsby v. Bullock*, 10 Allen, 94; *Burroughs v. Nutting*, 105 Mass. 228; *Vreeland v. Ryno*, 26 N. J. Eq. 160; *Beals v. Storm*, 26 N. J. Eq. 372.

⁴ *Forman's Will*, 54 Barb. 274; *Hopper's Will*, 33 N. Y. 619; *Parish Will Case*, 25 N. Y. 9; *McClintock v. Curd*, 32 Mo. 411.

other, and to be able to form some rational judgment in relation to these.”¹ If a man has sufficient mental capacity to manage his business, he is presumably competent to make a will. But this is not a sure and invariably reliable test. A man may be perfectly sane in every respect except one point; yet if his mental capacity to make *that* particular will is affected by the monomania, the will will be void.² Or, on the other hand, one may be insane on every other matter, and rational enough to make a will; and although it would be difficult in such cases to establish the sanity of the testator, yet if it was proven, the validity would not be affected by the testator’s insanity on other subjects.³ And so, if the testator is only suffering from a monomania which has no bearing upon her judgment and capacity to make the will, the validity will not be affected thereby.⁴ Thus, the subsequent suicide of the testator raises no presumption against the validity of the will.⁵

§ 882. **Who may be devisees — What assent necessary.**— Any person may be a devisee, including married women, infants, and corporations, which are not prohibited from taking real estate by devise. Except in Pennsylvania, the Statute of Mortmain has never been recognized in this country as the common law. But in New York, and perhaps in other States, corporations can take by devise only within

¹ Ch. J. Redfield in *Converse v. Converse*, 21 Vt. 170.

² 3 Washb. on Real Prop. 512; *Hopper’s Will*, 33 N. Y. 619; *Alexander’s Will*, 27 N. J. Eq. 463; *Townshend v. Townshend*, 7 Gill, 10; *Lucas v. Parsons*, 27 Ga. 593; *Denson v. Beazley*, 34 Texas, 191.

³ A most remarkable case is that of *Cartwright v. Cartwright*, 1 Phill. 90, where the testatrix, having been violently insane for some time, was permitted to write a will, and her hands were untied for that purpose. The will was so extremely rational in its terms and provisions that the court held it to have been made in a lucid interval. See *Bitner v. Bitner*, 65 Pa. St. 347; *Lucas v. Parsons*, 27 Ga. 593.

⁴ *Coghlan v. Coghlan*, 1 Phill. 120; *Weir’s Will*, 9 Dana, 434.

⁵ *Burrows v. Burrough*, 1 Hagg. 109; *Brooks v. Barrett*, 7 Pick. 94; *Duffield v. Morrows*, 2 Harr. 375.

the limits prescribed by statute.¹ A devise *in præsentì* takes effect immediately after the death of the testator. It is necessary that the devisee should then be *in esse*, in order that he may take at all.² This is the general rule, but two notable exceptions are now very generally recognized. It is now generally held that a devise to an unborn child *en ventre sa mère* will be good, and the vesting will be postponed until its birth.³ A devise to an unincorporated society, if for a charitable use, will be good and vest it in the society when it is subsequently incorporated.⁴ But no one can be made a devisee against his will. The title only vests in him when he assents to it. The law, however, presumes an acceptance in ordinary cases where the devise is a beneficial one. And it seems doubtful that any disclaimer, short of a deed of renunciation, will be sufficient to vest the title in the heir to the exclusion of a subsequent claim of the devisee.⁵ But this presumptive acceptance of the devisee will not be sufficient to bind the devisee by the charges and conditions upon the estate. Generally some affirmative act, such as entry into possession, will be required to make him liable. But if he enters into possession of the estate, he

¹ 3 Washb. on Real Prop. 512, 513.

² 2 Washb. on Real. Prop. 685; 3 Washb. on Real Prop. 530; *Ex parte Fuller*, 2 Story, 327; *Ives v. Allen*, 13 Vt. 629. But very often a devise to a person not *in esse* will be construed as an executory devise, if such a construction does not appear to be contrary to the intention of the testator. See *ante*, sect. 533.

³ *Burdett v. Hopegood*, 1 P. Wms. 486; *Mogg v. Mogg*, 1 Meriv. 654; *Pratt v. Flamer*, 5 Harr. & J. 10.

⁴ *Bartlett v. King*, 12 Mass. 536; *Burr v. Smith*, 7 Vt. 241; *Zimmerman v. Anders*, 6 Watts & S. 218; *Zeisweiss v. James*, 63 Pa. St. 465; *Am. Tract Soc. v. Atwater*, 30 Ohio St. 77; *Estate of Ticknor*, 13 Mich. 44. *Contra*, *White v. Howard*, 46 N. Y. 144; *Owens v. Missionary Soc.*, 14 N. Y. 380. And see *State v. Warren*, 28 Md. 338; *Craig v. Secrist*, 54 Ind. 419; *White v. Hale*, 2 Coldw. 77. See also *post*, sect. 884.

⁵ *Co. Lit.* 111 a; 4 Kent's Com. 533; *Doe v. Smyth*, 6 B. & C. 112; *Wilkinson v. Leland*, 2 Pet. 627; *Webster v. Gilman*, 1 Story, 499; *Ex parte Fuller*, 2 Story, 327; *Pickering v. Pickering*, 6 N. H. 120; *Tole v. Hardy*, 6 Cow. 340; *Bryan v. Hyre*, 1 Rob. (Va.) 94.

takes it subject to all the conditions and burdens imposed by the testator.¹

§ 883. **Devisee and devise must be clearly defined — Parol evidence.** — No particular formality is required to be observed in defining the subject-matter of a devise, the only general rule being, that the matter must be stated in language sufficiently clear to enable the courts to ascertain the person and property intended. The devise will not be void from uncertainty, as long as the property devised and the person of the devisee can be identified by the description in the will.² The courts always endeavor to ascertain the intention of the testator, if possible, and for that purpose give the widest latitude possible to the construction of wills, so that any misconception of the force and meaning of words will not prevent the will from taking effect or give it a wrong application. Thus, it is often necessary to substitute one word for another in a will, in order to carry out the intention of the testator. It is very common to substitute “and” for “or,” and *vice versa*, “all” for “any,” and the like. But this can only be done where the intention is clearly shown on the face of the will to be contrary to the ordinary meaning of the words used.³ It is the general rule, subject to exceptions to be mentioned hereafter, that parol evidence is not admissible to prove the intention of the tes-

¹ *Perry v. Hale*, 44 N. H. 65.

² *Trustees, etc., v. Hart*, 4 Wheat. 1; *Bartlett v. King*, 12 Mass. 537; *Sutton v. Cole*, 3 Pick. 232; *Button v. American Tract Soc.*, 23 Vt. 336; *Smith v. Smith*, 4 Paige, 271; *Hoge v. Hoge*, 1 Watts, 214; *Newell's Appeal*, 24 Pa. St. 197; *Baldwin v. Baldwin*, 7 N. J. Eq. 211; *Vansant v. Roberts*, 3 Md. 119; *Calhoun v. Furgeson*, 3 Rich. Eq. 160; *Alabama Conference v. Price*, 42 Ala. 39; *St. Louis Hospital v. Williams*, 19 Mo. 609; *Lepage v. McNamara*, 5 Iowa, 124.

³ *Story Eq. Jur.*, sect. 179; *Johnson v. Simcock*, 7 H. & Norm. 344; *Jackson v. Blanchan*, 6 Johns. 54; *Jackson v. Topping*, 1 Wend. 396; *Dexter v. Gardner*, 7 Allen, 243; *Holcomb v. Luke*, 25 N. J. L. 605.

tator.¹ The explanatory rule, which has been recognized as the prevailing test since the days of Bacon, is that parol evidence is not admissible to explain away a *patent* ambiguity, while it may control and remove a *latent* ambiguity. The ambiguity may concern the person intended to take or the thing devised. The distinction between *latent* and *patent* ambiguity, in respect to the admissibility of parol evidence, lies in a rule already given, that the intention must be gathered from the will itself. If it is a *patent* ambiguity the will does not express any certain intention, and it is, therefore, void from uncertainty. But if the ambiguity is *latent*, *i.e.*, discovered *dehors* the will, there would be no ambiguity as to the intention of the testator if the investigation was confined to the will itself. The ambiguity, arising from extraneous facts, may in like manner be explained away without violating the rule of evidence, that parol evidence is not admissible to contradict a writing.²

§ 884. **Devises to charitable uses.** — A notable exception to the rule, requiring the devisee to be definitely ascertained, occurs in the case of devises to charitable uses. It will be impossible to do more than give a general outline of this most interesting and difficult subject. The subject has been

¹ Farrar v. Ayres, 5 Pick. 407; Barrett v. Wright, 13 Pick. 405; Johnson v. Johnson, 18 N. H. 494; Avery v. Chappell, 6 Conn. 270; Jackson v. Lill, 11 Johns. 201; White v. Hicks, 33 N. Y. 383; Dey v. Dey, 19 N. J. Eq. 137; Kelly v. Kelly, 25 Pa. St. 460; Mordecai v. Jones, 6 Jones Eq. 365; Coffin v. Elliott, 9 Rich. Eq. 244; Willis v. Jenkins, 30 Ga. 169; Mitchell v. Walker, 17 B. Mon. 61; Judy v. Williams, 2 Ind. 449; Fitzpatrick v. Fitzpatrick, 36 Iowa, 674; Bradley v. Bradley, 24 Mo. 311; Robinson v. Bishop, 23 Ark. 378; Love v. Buchanan, 40 Miss. 758.

² Miller v. Travers, 8 Bing. 244; The Lady Franklin, 8 Wall. 325; Shaw v. Shaw, 50 Me. 94; Billings v. Billings, 10 Cush. 178; Cabot v. Windsor, 11 Allen, 346; Pickering v. Pickering, 50 N. H. 349; Spencer v. Higgins, 22 Conn. 521; Mann v. Mann, 14 Johns. 1; Hinneman v. Rosenbeck, 39 N. Y. 98; Nicholls v. Williams, 22 N. J. Eq. 63; Stokely v. Gordon, 8 Md. 496; Love v. Buchanan, 40 Miss. 758; Stephens v. Walker, 8 B. Mon. 600; Worman v. Teagarden, 2 Ohio St. 380; Grimes v. Harmon, 35 Ind. 246; Penton v. Tefft, 22 Ill. 366; Fitzpatrick v. Fitzpatrick, 36 Iowa, 674.

discussed and treated by many of America's most eminent jurists, and yet it does not seem to be definitely settled in all its details, no uniform rule having been adopted or discovered, which would be reliable and applicable in all the States.¹ It is here laid down that gifts to charitable uses will be sustained, although there are no trustees and no definite beneficiaries, provided the general intent of the testator can be ascertained. It has already been explained² that courts of equity will never suffer a trust to fail for the want of a trustee. But in ordinary trusts the *cestui que trust* must be definite and ascertained. The statute of 43 Eliz. ch. 4, enacted that where a devise was made to a charitable use, and no trustee was appointed, the court of chancery shall have the power to appoint trustees, who shall administer the trust in conformity with the testator's wishes, if they could be definitely ascertained and carried out, and if not, then as nearly as possible, the latter provision being known as the *cy pres* doctrine. It has always been a matter of considerable doubt whether the provisions of this statute constituted a part of the American jurisprudence, but the general importance of this question has been dissipated by the almost unanimous conclusion of the courts, that the statute was only remedial and confirmatory of the power which the court of chancery had previously possessed and exercised.³ The uncertainty which in private trusts would

¹ The subject constitutes more properly a part of the general subjects of Equity Jurisprudence and Uses and Trusts, and to standard works on these subjects, together with Prof. Theo. W. Dwight's argument in the Rose Will Case, published in book form, the reader is referred for a full and comprehensive discussion of it.

² See *ante*, sect. 508.

³ *Vidal v. Gerard*, 2 How. 127; *Going v. Emery*, 16 Pick. 107; *Baptist Ass. v. Hart*, 4 Wheat. 1; *Witman v. Lex*, 17 Serg. & R. 88; *Green v. Dennis*, 6 Conn. 292; *Earle v. Wood*, 8 Cush. 430; *Dexter v. Gardner*, 7 Allen, 246; *Jackson v. Phillips*, 14 Allen, 577; *Burbank v. Whitney*, 24 Pick. 152; *Potter v. Thornton*, 7 R. I. 263; *Bell Co. v. Alexander*, 22 Texas, 362; *Inglis v. Trustees of Sailors' Snug Harbor*, 3 Pet. 140. *Contra*, *Owens v. Missionary*

invalidate the devise, but which could be cured under the doctrine of charitable uses, may refer either to the trustee, to the beneficiary, or to the object of the devise. In all charitable uses the beneficiaries are indefinite and uncertain, usually consisting of a class, the individuals of which are constantly changing. Thus, where a devise is made to a university, or to found one, the beneficiaries are the students, who from time to time enter its halls. But it is a general rule that the object of charity, and the class of persons who are to be benefited by it, should be sufficiently described as to be capable of identification.¹ Where there is a trustee or board of trustees appointed by the will to administer the trust, it seems to be the universal rule, adopted alike in all the States, that such a charitable trust will be sustained if the class of beneficiaries is definitely described. And I apprehend that a greater uncertainty is permissible in such cases than in those in which no trustee has been appointed.² And where the trustees are authorized

Soc., 14 N. Y. 380; *Bascom v. Albertson*, 34 N. Y. 618. But whether the court of chancery had original jurisdiction, or it was first conferred upon it by the statute of Elizabeth, the doctrine of Charitable Uses is generally recognized throughout the United States. See *Tappan v. Deblois*, 45 Me. 122; *Drew v. Wakefield*, 54 Me. 295; *Burr's Ex'ors v. Smith*, 7 Vt. 241; *Dashiell v. Att'y-Gen.*, 5 Har. & J. 392; *Gallego v. Att'y-Gen.*, 3 Leigh, 450; *Beall v. Fox*, 4 Ga. 404; *Am. Bible Soc. v. Wetmore*, 17 Conn. 181; *Att'y-Gen. v. Moore*, 19 N. J. Eq. 503; *Trustees, etc., v. Zanesville C. & M. Co.*, 9 Ohio, 203; *Gals v. Wilhite*, 2 Dana, 170; *Griffin v. Graham*, 1 Hawks, 96; *Miller v. Chittenden*, 2 Iowa, 315.

¹ *Wheeler v. Smith*, 2 How. 55; *Perin v. Carey*, 24 How. 465; *Loring v. Marsh*, 6 Wall. 337; *Bartlett v. King*, 12 Mass. 537; *Att'y-Gen. v. Trinity Church*, 9 Allen, 422; *Treat's Appeal*, 30 Conn. 113; *State v. Griffith*, 2 Del. Ch. 392; *Newson v. Clark*, 46 Ga. 88; *Fink v. Fink*, 12 La. An. 301; *Wade v. Am. Col. Soc.*, 7 Smed. & M. 695; *More v. Moore*, 4 Dana, 354; *Miller v. Teachout*, 24 Ohio St. 525; *DeBruler v. Ferguson*, 54 Ind. 549; *Heuser v. Allen*, 42 Ill. 425; *Lepage v. McNamara*, 5 Iowa, 146.

² *Perry on Tr.*, sect. 732; *Beekman v. Bonsor*, 23 N. Y. 298; *Downing v. Marshall*, 23 N. Y. 366; *Going v. Emery*, 16 Pick. 107; *Treat's Appeal*, 30 Conn. 113; *Schultz's Appeal*, 80 Pa. St. 396; *State v. Griffith*, 2 Del. Ch. 392; *Needles v. Martin*, 33 Md. 609; *Bridges v. Pleasants*, 4 Ired. Eq. 26; *DeBruler*

by the will *to exercise their discretion* in the selection of the beneficiaries, the devise has in many cases been declared definite and valid, while it would probably be invalid, if the trustees were not appointed by the will. *Id certum est, quod certum reddi potest.*¹ It is also the rule, in perhaps all the States except New York, that where the object of the devise is certain and ascertainable, it will be sustained, although there are no ascertained trustees or beneficiaries. The courts of equity have the power in such cases to appoint trustees to carry out the will and administer the trust.² Whether the English doctrine of *cy pres* is applicable in this country to a devise to a charitable use, where no trustee is appointed, is a matter of some doubt. It is certain, however, that the courts would not, in following the tendency of the English courts, go so far as to authorize funds, bequeathed to found a *Jews' synagogue*, to be transferred to a foundling hospital, as was done in one case by an English court.³ And if the doctrine is recognized, it is applied in subordination to the general rule, that the courts cannot supply the intention of the testator by conjecture, but must

v. Ferguson, 54 Ind. 549; *Chambers v. St. Louis*, 29 Mo. 543; *Schmucker v. Reel*, 61 Mo. 592; *Lepage v. McNamara*, 5 Iowa, 146; *Miller v. Chittenden*, 2 Iowa, 315.

¹ *Treat's Appeal*, 30 Conn. 113; *Witman v. Lex*, 17 Serg. & R. 88; *Beavers v. Filson*, 8 Pa. St. 327; *Pickering v. Shotwell*, 10 Pa. St. 23; *Att'y-Gen. v. Jolly*, 1 Rich. Eq. 99. But there must be some definite description of the class of persons from which the trustees are to select. *Wheeler v. Smith*, 9 How. 55; *Fontain v. Ravenel*, 17 How. 369; *Levy v. Levy*, 33 N. Y. 97; *Gallego v. Att'y-Gen.*, 3 Leigh, 450; *Miller v. Atkinson*, 63 N. C. 537.

² *Preachers' Aid Soc. v. Rich*, 45 Me. 552; *Bliss v. Am. Bible Soc.*, 2 Allen, 334; *Sanderson v. White*, 18 Pick. 328; *Bull v. Bull*, 8 Conn. 47; *Stone v. Griffin*, 3 Vt. 400; *McAllister v. McAllister*, 46 Vt. 272; *McLain v. School Directors*, 51 Pa. St. 196; *Zeisweiss v. James*, 63 Pa. St. 465; *Dashiell v. Att'y-Gen.*, 5 Har. & J. 392; *Walker v. Walker*, 25 Ga. 420; *Mason v. M. E. Church*, 27 N. J. Eq. 47; *Williams v. Pearson*, 38 Ala. 299; *Urmey v. Wooden*, 1 Ohio St. 160; *Trustees, etc., v. Zanesville C. & M. Co.*, 9 Ohio, 203; *Gass v. Wilhite*, 2 Dana, 170; *Griffin v. Graham*, 1 Hawks, 96; *Miller v. Chittenden*, 2 Iowa, 315. *Contra*, *Levy v. Levy*, 33 N. Y. 97; *Bascom v. Albertson*, 34 Iowa, 584; *Downing v. Marshall*, 23 N. Y. 366.

³ 3 Washb. on Real Prop. 521; *Story on Eq. Jur.*, sect. 1169.

act in strict compliance with a general intent, appearing on the face of the will, and then only when the special intent cannot be carried out.¹ Finally, the doctrine of perpetuities does not apply to charitable uses.²

§ 885. **Lapsed devises — What becomes of them.** — A will speaks from the death of the testator, and all the elements requisite to the validity of the devise must be present and existing then, in order that the devise may take effect. If any one is wanting, as, for example, if the devisee has died before the testator, the devise lapses. And this is the case, although the devise is expressly limited to the devisee and his heirs. The word “heirs” in this connection is construed as a word of limitation, and the heirs cannot take as purchasers, unless it is the plain intent of the testator to give them the devise, as a limitation over in case of the death of their ancestor.³ But unless there is an explicit declaration of the person or persons who are to take the devise in the place of the deceased devisee, no declaration that the devise shall not lapse upon the death of the devisee will prevent it lapsing.⁴ A devise to two or more as joint

¹ *Fountain v. Ravenel*, 17 How. 389; *Loring v. Marsh*, 6 Wall. 337; *Harvard College v. Society*, etc., 3 Gray, 283; *Saunderson v. White*, 18 Pick. 333; *Brown v. Concord*, 33 N. H. 285; *Beekman v. Bonsor*, 23 N. Y. 308; *Holmes v. Mead*, 52 N. Y. 344; *Philadelphia v. Girard*, etc., 45 Pa. St. 28; *Methodist Church v. Remington*, 1 Watts, 226; *McAuley v. Wilson*, 1 Dev. Ch. 276; *Cromie's Heirs v. Louisville Home Soc.*, 3 Bush, 375.

² *Jackson v. Phillips*, 14 Allen, 550; *Odell v. Odell*, 10 Allen, 8; *Hillyard v. Miller*, 10 Pa. St. 335; *Griffin v. Graham*, 1 Hawks, 131; *Gass v. Wilhite*, 2 Dana, 183; *Miller v. Chittenden*, 2 Iowa, 362. *Contra*, *Levy v. Levy*, 33 N. Y. 130; *Bascom v. Albertson*, 34 N. Y. 598.

³ *Long v. Watkinson*, 17 Beav. 471; *Hinchliffe v. Westwood*, 2 De G. & S. 216; *Kimball v. Story*, 108 Mass. 382; *Armstrong v. Moran*, 1 Bradf. 314; *Hawn v. Banks*, 4 Edw. Ch. 664; *Weishaupt v. Brehman*, 5 Binn. 115; *Comfort v. Mather*, 2 Watts & S. 450; *Dickinson v. Parvis*, 8 Serg. & R. 71; *Hand v. Marcy*, 28 N. J. Eq. 59; *Davis v. Taul*, 6 Dana, 52.

⁴ *Williams on Ex.* 1306; 2 Redf. on Wills, 163; *Aspinwall v. Duckworth*, 35 Beav. 307; *Hutchinson's Appeal*, 34 Conn. 300; *Craighead v. Given*, 10 Serg. & R. 351.

tenants will not lapse upon the death of one, not even as to his share. The survivors will take the entire estate.¹ But the share of one co-tenant in a devise to several as tenants in common lapses, the difference in the rule arising out of the distinction between the two kinds of joint estates.² If the devise is to a class, the individuals of which are changing, such as, for example, a devise to my "children," not naming them or indicating in any other way that certain definite individuals were intended, those individuals of the class who survive the testator take the entire devise, and there can be no lapse of such a devise unless all the persons, who could be included in the class described, have predeceased the testator.³ And even where the members of the class are given, it has been held that there will be no lapse of the devise, if there is nothing else in the will to rebut the presumption that the persons named are to take as a class.⁴ It is now also provided in a number of the States that upon the death of the devisee before the testator, if he be a son or other relative of the testator, his lineal heirs will take the estate in his place. The statutes vary in detail, some confining

¹ *Anderson v. Parsons*, 4 Me. 486; *Doyle v. Doyle*, 103 Mass. 489; *De Camp v. Hall*, 42 Vt. 483; *Bolles v. Smith*, 39 Conn. 219; *Putnam v. Putnam*, 4 Bradf. 308; *Gross' Estate*, 10 Pa. St. 360; *Stephens v. Miller*, 24 N. J. Eq. 358; *Craycroft v. Craycroft*, 6 Har. & J. 54; *Luke v. Marshall*, 5 J. J. Marsh. 357.

² *Upham v. Emerson*, 119 Mass. 509; *Cummings v. Bramhall*, 120 Mass. 552; *Floyd v. Barker*, 1 Paige, 480; *Van Buren v. Dash*, 30 N. Y. 393; *Allison v. Kurtz*, 2 Watts, 185; *Mason v. Trustees Methodist Church*, 27 N. J. Eq. 47; *Mebane v. Womack*, 2 Jones Eq. 293; *Gray v. Bailey*, 42 Ind. 349.

³ 2 Redf. on Wills, 170; 1 Jar. on Wills (5th Am. ed.), 623; *Dimond v. Bostick*, L. R. 10 Ch. 358; *Schaffer v. Kettell*, 14 Allen, 528; *Downing v. Marshall*, 23 N. Y. 366; *Young v. Robinson*, 11 Gill & J. 328; *Yeates v. Gill*, 9 B. Mon. 206.

⁴ *Schaffer v. Kettell*, 14 Allen, 528; *Stedman v. Priest*, 103 Mass. 293; *Warner's Appeal*, 39 Conn. 253; *Magaw v. Field*, 48 N. Y. 668; *Hoppock v. Tucker*, 59 N. Y. 202; *Springer v. Congleton*, 30 Ga. 977. *Contra*, *Williams v. Neff*, 52 Pa. St. 333; *Frazier v. Frazier*, 2 Leigh, 642. See also *Morse v. Morse*, 11 Allen, 36; *Todd v. Trott*, 64 N. C. 280; *Starling v. Price*, 16 Ohio St. 32.

the provisions to the lineal heirs of a deceased son or grandson, others extending the benefit to the general heirs of any relative who is named as a devisee, while others go to the length of declaring the heirs of all devisees capable of taking in their ancestor's place, thus abolishing altogether the doctrine of lapse in case of the death of the devisee.¹ After determining that in a given case a devise has lapsed, there is the further question, in whom does it vest. And it may be stated as a general rule everywhere, in the absence of statutory provisions to the contrary, that although lapsed legacies and bequests go to the residuary legatee, lapsed devises vest in the heir at law.² A distinction is made in the English law, in this connection, between those devises which lapse from the death of the devisee after the execution of the will, and those which are void *ab initio* for some cause, such as the death of the devisee before the execution of the will. In the latter case it is held, that the lapsed devise goes to the residuary devisee, on the ground that since the testator intends the residuary devisee to take all the property not previously disposed of, the testator intends him to take this void devise, for a *void* devise does not dispose of the property.³ But the weight of authority, in fact all the authorities except the case just cited, reject this distinction, holding that the attempt to make a specific devise indicates the intention at the time that the residuary devisee is not to take, and by the common law the residuary

¹ 3 Washb. on Real Prop. 523; 1 Jar. on Wills (5th Am. ed.), 638, Am. note; Moore v. Dimond, 5 R. I. 121; Sheets v. Grubb, 4 Metc. (Ky.) 340.

² Doe v. Underdown, Willes, 293; Doe v. Scott, 3 Maule & S. 300; Hayden v. Stoughton, 5 Pick. 528; Austin v. Cambridgeport Parish, 21 Pick. 224; Greene v. Dennis, 6 Conn. 292; Remington v. Am. Bible Soc., 44 Conn. 672; James v. James, 4 Paige, 115; Van Cortlandt v. Kip, 7 Hill. 346; Gill v. Brouwer, 37 N. Y. 549; Lingan v. Carroll, 3 Har. & McH. 333; Adams v. Bass, 18 Ga. 130; Starkweather v. Am. Bible Soc., 72 Ill. 50.

³ Doe v. Sheffield, 13 East, 526; Ferguson v. Hedges, 1 Harr. 521.

devisee only takes what was intended for him at the time of making the will.¹

§ 886. **Revocation of wills.** — Until the death of the testator the will is ambulatory and can be revoked at the pleasure of the testator. But in order that it may be revoked, something more must be done than a declaration to that effect. Revocation may be express or implied. An express revocation results from an affirmative act of the testator, *animo revocandi*. A revocation is implied from some act of the testator inconsistent with the continued existence of the will, but not expressly intended to revoke the will, or from some subsequently occurring circumstances which the law has declared incompatible with the will, and which in consequence works a revocation. These various modes of revocation will be discussed in the succeeding paragraphs. The only exception to the general revocability of wills occurs in the case of joint or mutual wills. Although these wills were at first looked upon as suspicious and doubtful instruments, they are now recognized as valid. Until the death of either party, the will is revocable by either, although such revocation may work a breach of a valid and effective compact.² But after the death of one of the testators the vesting of his part of the will is considered as being so far the part performance of an executory contract, as to prevent the revocation of the will by the survivor.³

Van Kleek v. Dutch Church, 20 Wend. 427; Green v. Dennis, 6 Conn. 292; Brewster v. McCall's Devisees, 15 Conn. 297; State v. Whitbank, 2 Harr. 18; Lingan v. Carroll, 3 Har. & McH. 333.

² Gould v. Mansfield, 103 Mass. 403; Clayton v. Liverman, 2 Dev. & B. 558; Evans v. Smith, 28 Ga. 98; Schumacher v. Schmidt, 44 Ala. 454. In Breathitt v. Whitaker, 8 B. Mon. 530, it was held that a joint will could not be revoked at all.

³ Dufour v. Pereira, 1 Dick. 419; Ex parte Day, 1 Bradf. 478; Izard v. Middleton, 1 Desau. 115; Rivers v. Rivers, 3 Id. 190; Schumacher v. Schmidt, 44 Ala. 454.

§ 887. **Revocation by destruction of will.** — Any burning, cancellation, or other destruction of the instrument, although such destruction be only partial, will be sufficient to revoke a will. All that is necessary is some act conclusive of an intention to destroy it.¹ But the act of destruction must have been done *animo revocandi*, and it requires just as much capacity of mind to revoke a will as it does to make one.² Not only is the intention to revoke necessary to give to an act of destruction the effect of a revocation, but the act is also necessary. A mere intention to revoke, without doing some act required by law to evince that intention, will not work a revocation; and this is also true, although the execution of the intention to destroy the will has been frustrated by the fraudulent or other interference of a third person.³

§ 888. **Revocation by marriage and issue.** — As has already been explained, a single woman could at common law make a will, but a married woman could not. In consequence of this disability upon the married woman, it was held that the will of a single woman was revoked by her subsequent marriage.⁴ In some of the States married women

¹ Goods of Frazer, L. R. 2 P. & D. 40; Sweet v. Sweet, 2 Redf. 451; Avery v. Pixley, 4 Mass. 460; Evan's Appeal, 58 Pa. St. 244; Johnson v. Brailsford, 2 Nott & M. 272; Bohannon v. Wolcot, 1 How. (Miss.) 336.

² Laughton v. Atkins, 1 Pick. 535; Smith v. Wait, 4 Barb. 23; Forman's Will, 54 Barb. 274; Idley v. Bowen, 11 Wend. 227; Burns v. Burns, 4 Serg. & R. 295; Smock v. Smock, 11 N. J. Eq. 156; Shades v. Vinson, 9 Gill, 169; Ford v. Ford, 7 Humph. 92; Wright v. Wright, 5 Ind. 389.

³ Clark v. Smith, 34 Barb. 340; Delafield v. Parrish, 25 N. Y. 9; Clingan v. Mitcheltree, 31 Pa. St. 25; Dunlop v. Dunlop, 10 Watts, 153; Mundy v. Mundy, 15 N. J. Eq. 290; Hise v. Fincher, 10 Ired. 139; Boyd v. Cook, 3 Leigh, 32; Gains v. Gains, 2 A. K. Marsh. 190; Kent v. Mahaffey, 10 Ohio St. 204. See Card v. Grinman, 5 Conn. 164; Blanchard v. Blanchard, 32 Vt. 62; Heise v. Heise, 31 Pa. St. 246; Pryor v. Coggen, 17 Ga. 444; Wright v. Wright, 5 Ind. 389; Runkle v. Gates, 11 Ind. 95; Smiley v. Gambill, 2 Head, 164.

⁴ 3 Washb. on Real Prop. 539; 4 Kent's Com. 527; Forse v. Hembling, 4 Rep. 61; Cotter v. Layer, 2 P. Wms. 624; Morton v. Onion, 45 Vt. 145; Frauen's Appeal, 26 Pa. St. 204.

are permitted to make wills, but in the same States it is generally provided that the husband shall be heir of an intestate wife. It is, therefore, still generally enacted by statute in those States that the subsequent marriage of a testatrix will work an absolute revocation of the will.¹ But the marriage of a man does not at common law revoke his prior will, unless he has issue. The wife at common law could not be the heir of her husband, and she was considered amply provided for in her dower. There was, therefore, no change effected in the man's circumstances by his marriage, which would call for a revocation of his will, until issue was born to him.² But in a great many of the States the widow is now by statute made an heir to the husband, and, although there are statutes in some of these States expressly declaring a man's will revoked by his subsequent marriage, his marriage would revoke the will without any express enactment.³ But the subsequent marriage and having of issue will only work a revocation, as a general rule, where the testator has not provided in his will for the contingency of his marriage. If he has made provisions for his future wife and children, the will will stand.⁴ If a child has been unintentionally omitted from the provisions of a will, it is generally provided by statute that the will will be revoked *pro tanto*, and the share which this child would have received of his father's estate, had he died intestate, will be given to

¹ Statutes of this character are to be found in Alabama, Arkansas, California, Indiana, Missouri, New York and Oregon. 1 Jar. on Wills (5th Am. ed.), 269, Am. note.

² Warner v. Beach, 4 Gray, 162; Havens v. Van den Burgh, 1 Denio, 27; Tomlinson v. Tomlinson, 1 Ashm. 224; McCullun v. McKenzie, 26 Iowa, 510; Carey v. Baughn, 36 Iowa, 542.

³ See Walker v. Hall, 34 Pa. St. 483; Tyler v. Tyler, 19 Ill. 151; Am. Board v. Nelson, 72 Ill. 564; Stokes v. O'Fallon, 2 Mo. 29.

⁴ Wheeler v. Wheeler, 1 R. I. 364; Miller v. Phillips, 9 R. I. 141; Warner v. Beach, 4 Gray, 162; Bush v. Wilkins, 4 Johns. Ch. 506; Havens v. Van den Burgh, 1 Denio, 27; Deupree v. Deupree, 45 Ga. 415; Yerby v. Yerby, 3 Cal., 334.

it. But a testator may disinherit a child if he wishes, and it may be shown by parol that the omission of his name was intentional.¹ But in some of the States it is held that the intention to disinherit cannot be shown by parol evidence, and that the intention must be gathered from the will.² There are similar statutory rules in most of the States, providing for a partial revocation of a will in favor of posthumous children. But in all the cases of revocation by marriage and birth of issue the rule only applies to wills, which dispose of the testator's own property. It does not apply to wills executed under a power of appointment, disposing of property which the wife or children of the testator could under no circumstances inherit.³

§ 889. **Revocation by alteration or exchange of property.** — If the testator disposes of the property devised by alienation *inter vivos*, it will, of course, revoke the devise.⁴ And this is also the rule in equity, where the testator has contracted to sell, but has made no conveyance.⁵ But although, under the old English rule concerning after-acquired

¹ *Doane v. Lake*, 32 Me. 268; *Wilson v. Fosket*, 6 Metc. 400; *Bancroft v. Ives*, 3 Gray, 367; *Ramsdill v. Wentworth*, 101 Mass. 125; *Buckley v. Gerard*, 123 Mass. 8; *Lorieux v. Keller*, 5 Iowa, 196.

² *Chace v. Chace*, 6 R. I. 407; *Guitar v. Gordon*, 17 Mo. 408; *Bradley v. Bradley*, 24 Mo. 311; *Pounds v. Dale*, 48 Mo. 270; *Estate of Garrand*, 35 Cal. 336.

³ *Loring v. Marsh*, 6 Wall. 337; *Blagge v. Miles*, 1 Story, 426; *Waterman v. Hawkins*, 63 Me. 156; *Warner v. Beach*, 4 Gray, 162; *Wilder v. Thayer*, 97 Mass. 439; *Brush v. Wilkins*, 4 Johns. Ch. 506; *Havens v. Van den Burgh*, 1 Denio, 27; *Hargadine v. Pulte*, 27 Mo. 423; *Burch v. Brown*, 46 Mo. 441; *Schneider v. Koester*, 54 Mo. 500; *Bresee v. Stilas*, 22 Wis. 120; *Estate of Utz*, 43 Cal. 200.

⁴ *Bosley v. Bosley*, 14 How. 390; *Carter v. Thomas*, 4 Me. 341; *Hawes v. Humphrey*, 9 Pick. 350; *Brown v. Thorndike*, 15 Pick. 388; *In re Van Mickel*, 14 Johns. 324; *McNaughton v. McNaughton*, 34 N. Y. 201; *Balliett's Appeal*, 14 Pa. St. 451; *Brush v. Brush*, 11 Ohio, 287; *Floyd v. Floyd*, 7 B. Mon. 290; *Wells v. Wells*, 35 Miss. 638.

⁵ 4 Kent's Com. 527; *Darley v. Darley*, 3 Wils. 6; *Walton v. Walton*, 7 Johns. Ch. 258; *Kean's Case*, 9 Dana, 25.

property, the rule might be different, it is now held that the subsequent conveyance of the land to the testator will revive the devise without any formal republication.¹ Not only does the actual conveyance of the land revoke a devise, but it has also been held that an unsuccessful or void conveyance will have the same effect as indicating an intention to revoke the devise.²

§ 890. **Revocation by subsequent will or codicil.** — A will may also be revoked by a subsequent will or codicil. A codicil is nothing more than a supplementary will, and only revokes the will *pro tanto*. A subsequent will or codicil may revoke the prior will by implication, where the two are inconsistent and cannot stand together; or the testator may in his subsequent will expressly declare the prior will revoked. And in the absence of an express revocation the prior will will be revoked only as to those provisions, which are inconsistent with the dispositions made in the subsequent will or codicil.³ And the burden is upon the one opposing the earlier will to show that the testator intended to revoke it.⁴ Where the prior will is only revoked by the subsequent will by implication from the inconsistency of its clauses, revocation by destruction of the second will will

¹ *Brown v. Brown*, 16 Barb. 569; *Woolery v. Woolery*, 48 Ind. 523.

² 3 Washb. on Real Prop. 538, 539; 4 Kent's Com. 529. This rule would hardly be followed at the present day. The revocation by exchange or sale of the property devised is only implied from the act of sale; and implications are never permitted to operate beyond what it is made necessary by the act, which gives rise to the implication. If, therefore, an attempted conveyance fails, it should not operate as a revocation of the devise.

³ *Pickering v. Langdon*, 22 Me. 413; *Derby v. Derby*, 4 R. I. 414; *Brant v. Wilson*, 8 Cow. 56; *Van Vechten v. Keator*, 63 N. Y. 52; *Den v. Van Cleve*, 5 N. J. L. 589; *Smith v. McChesney*, 15 N. J. Eq. 359; *Bartholomew's Appeal*, 75 Pa. St. 169; *Boudinot v. Bradford*, 2 Dall. 266; *Petters v. Petters*, 4 McCord, 151; *Brownfield v. Wilson*, 78 Ill. 467.

⁴ *Richards v. Queen's Proctor*, 18 Jur. 540; *Leslie v. Leslie*, 6 Ired. Eq. 332.

revive the prior will without any former republication.¹ But if the prior will has been cancelled, or is revoked by express declaration, a republication as formal as the original execution is generally necessary to revive it.² But it has been generally held that the execution of a codicil, containing an express reference to the prior will, is a sufficient republication to bring the prior will into active operation again from the time, when the codicil was executed.³

§ 891. **Contingent wills.**—In connection with the subject of revocation, it may be well to state something concerning contingent wills. A will can be made to take effect or to fail upon the happening of the contingency. A common case is a will made expressly, to take effect only upon the death of the testator away from home or while on a journey. If the testator survives the contingency, the will cannot be admitted to probate.⁴

¹ 4 Kent's Com. 528; 3 Washb. on Real Prop. 540; *Brown v. Brown*, 8 E. & B. 876; *Wood v. Wood*, L. R. 1 P. & D. 309; *Bohannon v. Walcot*, 1 How. (Miss.) 336. In New York, Ohio, Indiana, Missouri and Arkansas the prior will can only be revived by republication in any case. 3 Washb. on Real Prop. 542, note.

² *James v. Marvin*, 3 Conn. 576; *Colvin v. Warford*, 20 Md. 357; *Rudisiles v. Rodes*, 29 Gratt. 147; *Marsh v. Marsh*, 3 Jones L. 77; *Bohannon v. Walcot*, 1 How. (Miss.) 336; *Beaumont v. Keim*, 50 Mo. 28. *Contra*, *Lawson v. Morrison*, 2 Dall. 286. See *Taylor v. Taylor*, 2 Nott & M. 482.

³ *Havens v. Foster*, 14 Pick. 534; *Mooers v. White*, 6 Johns. Ch. 375; *Van Cortlandt v. Kip*, 1 Hill, 590; *Jones v. Jones*, 1 Gill, 395; *Rose v. Drayton*, 4 Rich. Eq. 260; *Jones v. Shewmake*, 35 Ga. 151; *Stover v. Kendall*, 1 Coldw. 557; *Barker v. Bell*, 46 Ala. 216; *Armstrong v. Armstrong*, 14 B. Mon. 333; *Duncan v. Duncan*, 23 Ill. 364; *Harvey v. Chouteau*, 14 Mo. 587; *Payne v. Payne*, 18 Cal. 291.

⁴ In *re Porter*, L. R. 2 P. & D. 22; *Lindsay v. Lindsay*, L. R. 2 P. & D. 459; *Tarver v. Tarver*, 9 Pet. 174; *Turner v. Scott*, 51 Pa. St. 126; *Ritter's Appeal*, 59 Pa. St. 9; *Wagner v. McDonald*, 2 Har. & J. 346; *Jacks v. Henderson*, 1 Desau. 543; *Maxwell*, 3 Metc. (Ky.) 101. But see *contra*, *Damon v. Damon*, 8 Allen, 192.

§ 892. **Probate of will.** — In the States of this country, different from the old English law, it is provided that wills of real property shall be admitted to general probate, and when they have been admitted, and placed on record, the probated will becomes conclusive evidence of its own proper execution in any case arising collaterally in another court.¹ It is also provided by the Statutes of Probate that a copy of the will certified by the judge of probate or his clerk is competent evidence of its contents. The old English law only provided for the probate of wills of personal property.

¹ 3 Washb. on Real Prop. 508; 1 Greenl. on Ev., sect. 518.

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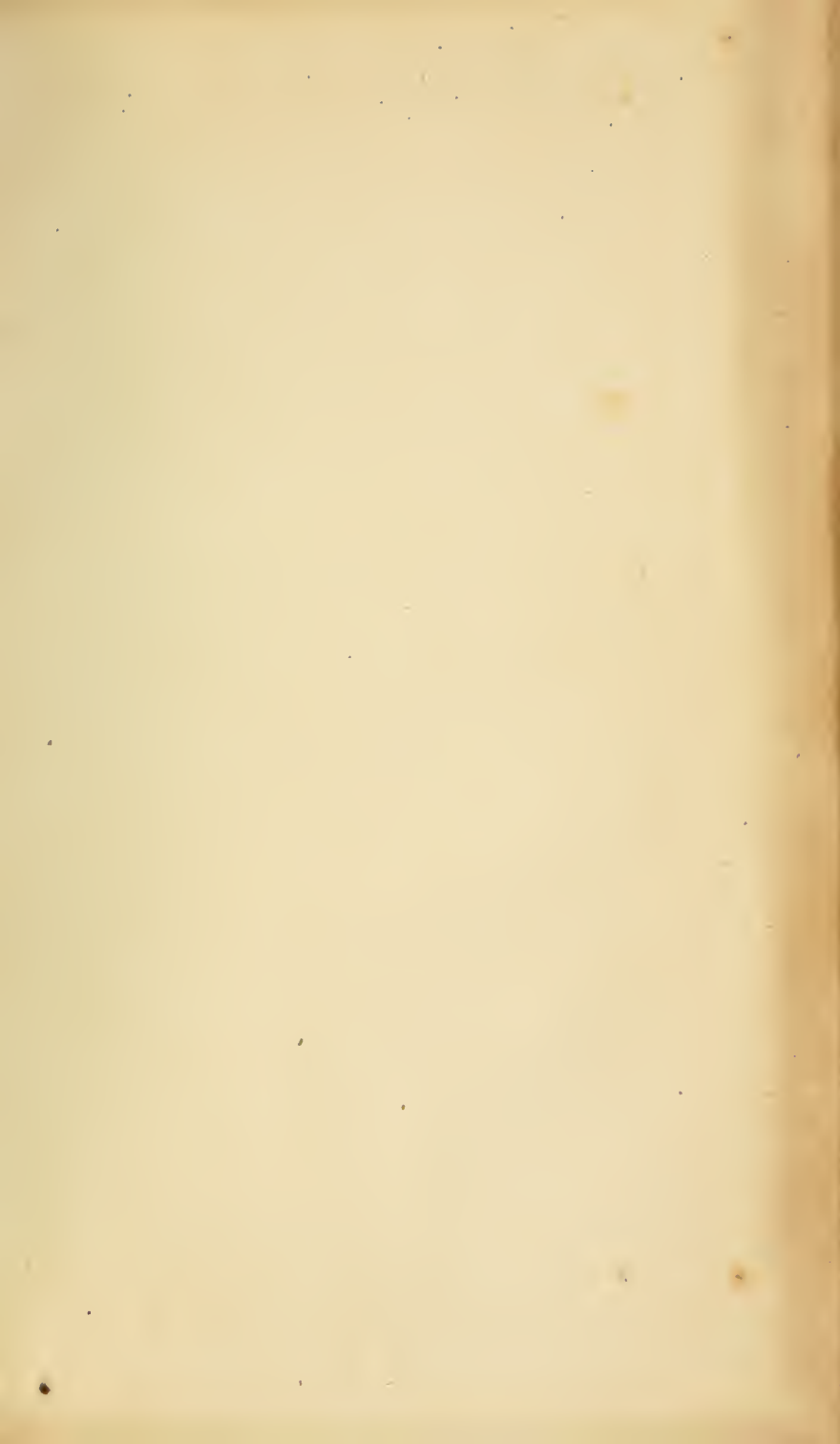
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